Supreme Court, U.S.
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In The

Supreme Court of the United States

OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the 5-year statute of limitations of Section 12 of the Indian Claims Commission Act of 1946 ("ICCA"), 60 Stat. 1049, 1052 (formerly codified at 25 U.S.C. § 70k (repealed)), which applies only to claims accruing no later than August 13, 1946, bar federal court jurisdiction over an Indian tribe's claim that the Government breached its trust responsibility to consult with the tribe before taking significant actions adversely affecting the preservation and protection of the numerous items and sites of the tribe's cultural and historic heritage located on federal lands within the tribe's aboriginal territory, specifically before making the transfers of federal lands authorized by the Water Resources Development Act of August 17, 1999, Pub. L. 106-53, Title VI, §§ 601-609, 113 Stat. 269 ("WRDA"), where the tribe's breach-of-duty-to-consult claim does not involve either an historical land claim for money damages or the revision of treaties, contracts or agreements between the tribe and the United States, and where the breach occurred no earlier than 2002 when the WRDA transfers began?

2. Does an Indian tribe have standing to pursue its claim that the Government breached its trust responsibility to consult with the tribe before taking significant actions adversely affecting the preservation and protection of the numerous items and sites of the tribe's cultural and historic heritage located on lands within the tribe's aboriginal territory, where the

QUESTIONS PRESENTED – Continued

merit of the tribe's non-frivolous contention, that it has a legally protected interest in the tribe's aboriginal territory based on the Government's trust relationship with the Indian tribes, must be assumed in assessing the tribe's standing to sue?

3. Does the ICCA's 5-year statute of limitations bar federal court jurisdiction of a Sioux Indian tribe's claims that the 1889 Act of Congress purportedly changing the boundaries of the Great Sioux Reservation never went into effect for failure to satisfy the conditions specified by Congress in Section 28 of that Act, where those claims do not involve either an historical land claim or the revision of treaties, contracts or agreements between the Tribe and the United States?

4. Does a Sioux Indian tribe have standing to pursue its claims that an 1889 Act of Congress purportedly changing the Great Sioux Reservation boundaries never went into effect for failure to satisfy the conditions specified by Congress, where the challenged WRDA transfers of federal lands to the State of South Dakota adversely affect the tribe's legally protected interests in Native American cultural and historic items and sites located on federally-owned fee lands situated within the pre-1889 Act boundaries of the Great Sioux Reservation, thereby triggering the obligation under Article 12 of the Fort Laramie Treaty of 1868 to obtain the consent of the Sioux Tribes to this "cession" of reservation territory?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing in the court whose judgment is sought to be reviewed.

The Petitioner (Appellant) below is the Oglala Sioux Tribe of the Pine Ridge Indian Reservation.

The Respondents (Appellees) below are The United States Army Corps of Engineers; Les Brownlee, Acting Secretary of the Army; Domonic Izzo, Principal Deputy Assistant Secretary of the Army for Civil Works; Robert B. Flowers, Chief of Engineers; Kurt F. Ubbelohde, Omaha District Commander and District Engineer, Department of the Army, Corps of Engineers; and The United States of America.

CORPORATE DISCLOSURE STATEMENT

The Oglala Sioux Tribe is a sovereign, unincorporated Indian Tribe.

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OPINIONS BELOW

The District Court for the District of Columbia issued its Memorandum Opinion dismissing the case on March 17, 2008 (App. 21). *Oglala Sioux Tribe v. United States Army Corps of Engineers*, 537 F. Supp. 2d 161 (D.D.C. 2008), *aff'd*, 570 F.3d 327 (D.C. Cir. 2009). This decision was subsequently affirmed by the United States Court of Appeals for the District of Columbia Circuit on June 26, 2009 in a majority opinion authored by Senior Circuit Judge Randolph (App. 1-14). *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States Army Corps of Engineers*, 570 F.3d 327 (D.C. Cir. 2009). Circuit Judge Tatel filed a separate opinion, concurring in part, concurring in the judgment, and dissenting in part (App. 14-20). *Id.*, 570 F.3d at 334.

JURISDICTION

The judgment of the District of Columbia Circuit was entered on June 26, 2009 (App. 48-49). The District of Columbia Circuit denied the Petitioner's timely petition for rehearing *en banc* on November 30, 2009 (App. 50-51). Jurisdiction of this Court to review of the judgment of the District of Columbia Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

TREATIES AND STATUTES INVOLVED IN THE CASE

Treaty with the Oglala Sioux, July 5, 1825, Arts. 2 & 3, 7 Stat. 253.

Fort Laramie Treaty of September 17, 1851, Art. 5, 11 Stat. 749.

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Indian Claims Commission Act of August 13, 1946, § 12, 60 Stat. 1049, 1052, formerly codified at 25 U.S.C. § 70k (repealed).

Native American Graves Protection and Repatriation Act of November 16, 1990, P.L. 101-602, 104 Stat. 3048, 25 U.S.C. §§ 3001(15)(A) & 3002.

Water Resources Development Act of August 17, 1999, Pub. L. 106-53, § 607(a)(4), 113 Stat. 269, 395

STATEMENT OF THE CASE

This petition presents four questions of great public importance in that the correct resolution of each of these questions is absolutely vital to the ability of the Tribe and other Indian tribes to adequately protect and preserve the tribes' and the

Nation's Native American cultural and historic heritage.

The Tribe is a body politic of approximately 41,000 citizens with territory of over 4,700 square miles in south-western South Dakota. The Tribe is the freely and democratically-elected government of the Oglala Sioux people, with a governing body recognized by the Secretary of the Interior (App. 60). It is the successor-in-interest to the Oglala Band of the Teton Division of the Sioux Nation.[1] In 1936, the Oglala Band reorganized as the "Oglala Sioux Tribe of the Pine Ridge Indian Reservation" under § 16 of the Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 476, and enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b (App. 60).

Since time immemorial, up to and through the time of some of the actions forming the basis of the Tribe's Complaint, the seven Teton bands (including what is now the Oglala Sioux Tribe), jointly and severally, have exclusively used and occupied the following territory in the Missouri River basin: (a)

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[1] The Sioux Nation is comprised of seven divisions: (1) Medawakanton; (2) Sisseton; (3) Wahpakoota; (4) Wahpeton; (5) Yankton; (6) Yanatonai; and (7) Teton. *Sioux Nation v. United States*, 24 Ind. Cl. Comm. 147, 162 (1970). The Teton Division is comprised of seven distinct, sovereign bands: (1) Blackfeet; (2) Brule; (3) Hunkpapa; (4) Minnecounjou; (5) No Bows; (6) Oglala; and (7) Two Kettle (App. 63).

West of the Missouri River, approximately sixty million acres of land in what are now the States of North Dakota, South Dakota, Nebraska, Montana and Wyoming; (b) East of the Missouri River, approximately 14 million acres of land in what are now the States of North Dakota and South Dakota (App. 64).

On July 5, 1825, the United States and the Oglala Band entered into a treaty of friendship and protection, 7 Stat. 252, that was ratified by the United States and proclaimed on February 6, 1826 (App. 65). By Article 2 of the 1825 Treaty, 7 Stat. 253, the United States brought the Oglala Band and its members under its protection and the Oglala Band became a protectorate nation of the United States. (*Id.*) (App. 52). By Article 3 of the 1825 Treaty, 7 Stat. 253, Congress extended the Trade and Intercourse Acts to the Oglala Band and its aboriginal territory, including permanent successor provisions of § 12 of the Act of June 30, 1834, ch. 161, 4 Stat. 730, *currently codified at* 25 U.S.C. § 177 (App. 52, 65-66).

On September 17, 1851, the United States, the seven bands of the Teton Division of the Sioux Nation, and other signatory tribes, entered into a treaty known as the 1851 Fort Laramie Treaty, 11 Stat. 749, which was duly ratified by the United States (App. 53). Article 5 of the 1851 Fort Laramie Treaty defined the territory of the bands of the Teton Division ("1851 Treaty territory") as follows:

> commencing at the mouth of the White Earth River, on the Missouri River; thence in a

> southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Butte, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the headwaters of the Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning (App. 53-55, 66).

In *Sioux Tribe v. United States*, 15 Ind. Cl. Comm. 577 (1965), the Indian Claims Commission ruled that the 1851 Ft. Laramie Treaty was a multilateral treaty by which the United States recognized the aboriginal territory of both the seven Teton bands and the other signatory tribes. (App. 66-67). The Commission further ruled that Article 5 of the 1851 Ft. Laramie Treaty recognized the Teton bands' joint and several aboriginal Indian title to (1) the entire sixty million acre area west of the Missouri River and (2) the entire fourteen million acre east of the Missouri River, *Sioux Nation v. United States*, 23 Ind. Cl. Comm. 419, 424 (1970) (App. 66-67).

Unconsented encroachments on the 1851 Ft. Laramie Treaty territory by the United States and its citizens resulted in the Powder River War of 1866-1868 between the United States and the Teton bands. Peace was concluded by a treaty entered into on April 29, 1868, 15 Stat. 635, known as the 1868 Fort Laramie Treaty ("1868 Treaty"), duly ratified by the United States on February 16, 1869 and proclaimed on February 24, 1869 (App. 67). The 1868 Treaty provided for a mutual demobilization without terms

of surrender on either side (App. 67). Article 2 of the 1868 Treaty established a designated territory within the 1851 Ft. Laramie Treaty territory boundaries for the seven Teton bands and other Sioux bands, a territory commonly referred to as the "Great Sioux Reservation" (App. 56-57, 67-68). Article 2 of the 1868 Treaty again recognized the seven Teton bands' aboriginal Indian title to all the lands within the Great Sioux Reservation, including all lands west of the low water mark of the east bank of the Missouri River, and again vested that title under the Constitution and laws of the United States (App. 56-57, 68). Article 12 of the 1868 Treaty further provided that no future cessions of territory within the Great Sioux Reservation would be "of any validity or force as against the said Indians, unless executed or signed by at least three-fourths of all the adult male Indians, occupying or interested in the same . . . " (App. 57, 68-69).

By the Act of February 28, 1877, ch. 72, 19 Stat. 254 ("1877 Act"), Congress purported to ratify and confirm an agreement between commissioners acting on behalf of the United States and the Teton and other bands of the Sioux Nation and the Northern Cheyenne and Arapaho tribes (App. 69). The purported agreement, which did not exist in fact or law, provided for the cession of over 7 million acres of land in the western part of the Great Sioux Reservation, including the Black Hills (App. 69). It was later determined that "the treaty was presented just to the Sioux chiefs and their leading men. It was signed by only 10% of the adult male Sioux population[,]" not

by the three-fourths required by Article 12 of the 1868 Fort Laramie Treaty. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 381-382 (1980).[2]

By the Act of March 2, 1889, ch. 405, 25 Stat. 888 ("1889 Act"), Congress *conditionally* provided for the creation of six smaller reservations within the balance of the Great Sioux Reservation, the release of title by Indian persons associated with each smaller reservation to each of the other five smaller reservations, and for the restoration to the public domain and the opening to settlement of the balance of the territory within the Great Sioux Reservation outside the boundaries of the six smaller reservations (App. 58, 69-70).[3] The effectiveness of the 1889 Act was expressly conditioned by § 28 of that Act upon the acceptance and consent to its provisions by the Sioux Indians in the manner required by Article 12 of the 1868 Fort Laramie Treaty, i.e., its execution and signature by three-fourths of the adult male members of bands and tribes signatory to the 1868 Treaty (App. 57, 58, 69-72).

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[2] In *United States v. Sioux Nation of Indians*, the Court held that the 1877 Act amounted to confiscation by the United States of the western end of the Great Sioux Reservation, in violation of both Article 12 of the 1868 Treaty and the Fifth Amendment to the Constitution, and that the United States was required to pay interest for this unconstitutional taking of land.

[3] The six smaller reservations are called the Pine Ridge Indian Reservation, the Rosebud Indian Reservation, the Standing Rock Indian Reservation, the Cheyenne River Indian Reservation, the Lower Brule Indian Reservation, and Crow Creek Indian Reservation (App. 70).

A three-member commission[4] appointed by the Secretary of the Interior (the "Crook Commission") was charged with obtaining the consent of three-fourths of the adult male members of the Sioux bands signatory to the 1868 Treaty, as required by § 28 of the 1889 Act in order for that Act to take effect (App. 72). The Crook Commission decided to seek to have the adult male members associated with each of the six agencies of the Interior Department within the Great Sioux Reservation ("Sioux agencies") sign a quitclaim deed to evidence their consent under Article 12 of the 1868 Treaty in accordance with § 28 of the 1889 Act (App. 72). The Commission scheduled meetings during the summer of 1889 at the six Sioux agencies to obtain the requisite number of signatures on quitclaim deeds (App. 72).

The Crook Commission failed to obtain the consent of three-fourths of the adult male members of the bands and tribes signatory to the 1868 Treaty (App. 72). Five thousand six hundred and seventy-eight (5,678) adult male members were eligible to give consent under Article 12 of the 1868 Treaty and § 28 of the 1889 Act, and three-fourths of that number equals 4,259. The Crook Commission obtained no more than 3,942 valid signatures on quitclaim deeds

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[4] The three members of the commission were Charles Foster of Ohio, William Warner of Missouri, and General George Crook of the United States Army. (*Message from the President of the United States*, Sen. Doc. No. 51, 51st Cong., 1st Sess., p. 1 (1890).)

(App. 73). Furthermore, the majority of the signatures obtained by the Crook Commission were obtained through coercion, fraud and bribery (App. 73-74).

On or about January 30, 1890, the Crook Commission submitted a report concerning its activities to President Benjamin Harrison entitled *Report and Proceedings of the Sioux Commission*, Sen. Exec. Doc. 51, 51st Cong. 1st Sess. (1890) ("1890 Commission Report"). Among other things, the 1890 Commission Report contained the names of each of the persons from whom the Commission had obtained signatures on quitclaim deeds. 1890 Commission Report, pp. 242-307. The census records contained in the 1890 Commission Report show *prima facie* that the Commission failed to obtain signatures from three-fourths of the adult male members eligible to give consent under Article 12 of the 1868 Treaty and § 28 of the 1889 Act (App. 74).

On February 10, 1890, President Harrison nevertheless issued a Proclamation, 26 Stat. 1554 ("1889 Proclamation"), declaring the 1889 Act "to be in full force and effect." (App. 75). Thereafter, "approximately one-half [of the Great Sioux Reservation that remained after the 1877 Act] was restored to the public domain . . . while six separate reservations [including the Pine Ridge Reservation of the Oglala Sioux Tribe] were carved out of the remainder." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 589 (1977).

Since 1890 and up to and including the present, the Oglala Band and its successor, the Oglala Sioux Tribe, has protested the facts set forth above continuously, publicly, and notoriously and has continuously, publicly and notoriously maintained that the boundaries of the Great Sioux Reservation were never diminished nor otherwise altered by the 1889 Act (App. 76). The Tribe likewise has continuously, publicly and notoriously maintained that it retains recognized aboriginal Indian title to all lands located in the Great Sioux Reservation and has never acquiesced in any claim or assertion that said boundaries have been diminished or otherwise altered or that such title has been relinquished or extinguished (App. 76). Since 1890 and up to and including the present, the United States has disregarded these protests. For example, the United States has denied the Band, the Tribe and its members, by force and threat of criminal prosecution, their right to use and occupy any lands – except lands within the Pine Ridge Reservation – within the balance of the Great Sioux Reservation, including all lands within the other five of the six smaller reservations conditionally created in §§ 2 through 6 of the 1889 Act and the nine million acres of land conditionally restored to the public domain and opened to settlement in § 21 of the Act (App. 76).

By the Water Resources Development Act of August 17, 1999, P.L. 106-53, Title VI, §§ 601-609, 113 Stat. 269, 385, *as amended by* the Water Resources Development Act of December 11, 2000,

P.L. 106-541, Title V, § 540, 114 Stat. 2572, 2664 ("WRDA"), Congress directed the Secretary of the Army to transfer title or grant perpetual leases to recreational areas and other lands around Lake Oahe, Lake Sharpe, Lake Francis Case, and Lewis and Clark Lake to the State of South Dakota, the Cheyenne River Sioux Tribe, and the Lower Brule Sioux Tribe on or before January 1, 2002 (App. 78). WRDA was enacted by Congress without public hearings and over the objections of the Oglala Sioux Tribe (App. 78). Fifty-one recreational areas and other lands around Lake Oahe, Lake Sharpe and Lake Francis Case are located within Oglala aboriginal territory. Eighteen of these areas and other lands are located west of the Missouri River within the Great Sioux Reservation and 33 of such areas and other lands are located outside the Great Sioux Reservation but within the fourteen million acre area east of the Missouri River that is part of Oglala aboriginal territory (App. 78-79).

In December 2001, the Tribe notified the Corps under the Native American Graves Protection and Repatriation Act of November 16, 1990, P.L. 101-601, 104 Stat. 3048, 25 U.S.C. § 3002(a) ("NAGPRA") that it claims ownership and control of all Native American cultural items excavated or discovered at all recreational areas and other lands that are the subject of this action (App. 81). Those lands also contain Native American cultural items and historic properties that are included or are eligible to be included in the National Register of Historic Places

established by the National Historic Preservation Act of October 15, 1966, P.L. 89-665, 80 Stat. 915, 16 U.S.C. § 470-470x-6 ("NHPA"), including human remains, funerary objects, grave goods, sacred places and other items of cultural patrimony, prehistoric and historic village sites, ceremonial sites, structures, objects, artifacts, and records, each of which is of traditional religious, cultural and historical importance to the Tribe and its members (App. 82).

As early as 1979, the Corps was notified by its contract archaeologists that cultural resources were being damaged and removed by recreational users (App. 84). The Corps took inadequate or ineffective protective measures, causing many of the religious, cultural and historical resources described above to be damaged or removed during the time the properties were managed by the Corps, without the knowledge or consent of the Tribe (App. 84).[5] Because the WRDA transfers will leave these properties with even less protection against future damage and removal of cultural resources, the cultural heritage of the Tribe and of the other bands of the Sioux Nation ("the Sioux Tribes") will continue to suffer irreparable harm (App. 81-84).

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[5] For example, the Walth Bay Village was reported in 1986 to be subject to continuing vandalism and disturbance from recreational visitors, and the largely unexcavated village site within the Spring-Cow Creek Recreational Area was already deteriorating in 1979 from erosion and recreational use (App. 84).

On December 28, 2001 the Tribe instituted the instant action in the United States District Court for the District of Columbia to enjoin the Corps from carrying out the transfers set forth in the WRDA. Jurisdiction in the District Court was predicated on 28 U.S.C. §§ 1331(a) and 1362.

In its first claim, the Tribe seeks a declaratory judgment that (1) the 1889 Act never became effective in accordance with the conditions fixed by § 28 of that Act; (2) that the 1889 Act therefore did not operate to diminish or otherwise alter the boundaries of the Great Sioux Reservation as defined by Article 2 of the 1868 Fort Laramie Treaty; (3) that no treaty or act of Congress subsequent to March 2, 1889 has ever diminished or otherwise altered the boundaries of the Great Sioux Reservation; and (4) that each of the recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation are subject to the provisions of Article 12 of the 1868 Fort Laramie Treaty (App. 85-86).

In its second claim, the Tribe seeks a declaratory judgment that the February 2002 transfers and leases by Defendants to the State of South Dakota of recreational areas and other lands within the boundaries of the Great Sioux Reservation, are without force or effect, and an injunction prohibiting Defendants from transferring any such recreational areas or other lands to the State of South Dakota pursuant to WRDA, without the voluntary consent of each of the bands of the Sioux Nation that were signatory to the 1868 Fort Laramie Treaty, or their successors,

including the Oglala Sioux Tribe, obtained in the manner and form specified in Article 12 of the 1868 Fort Laramie Treaty (App. 87-88).

In its third claim, the Tribe seeks a declaratory judgment that Defendants are required to consult with and reasonably accommodate the views of the Oglala Sioux Tribe prior to taking any significant actions regarding transfer, leasing or management of the recreational areas and other lands that are within the Oglala aboriginal territory and further seeks relief in the nature of mandamus to compel such consultation and reasonable accommodation (App. 88-89).[6]

On March 15, 2008, the District Court dismissed these three claims on the grounds that the Tribe lacked standing to assert them (App. 43-44). *OST v. USACE*, 537 F. Supp. 2d at 169-172. On June 26, 2009, the D.C. Circuit, by a 2-1 vote, affirmed the judgment of the District Court dismissing these claims, but on different grounds, namely that the claims were barred by the Indian Claims Commission Act (App. 6-12). *OST of PRIR v. USACE*, 570 F.3d at 331-333.

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[6] The Tribe also asserted a fourth claim, seeking relief in the nature of mandamus requiring the Corps to locate, inventory and nominate for inclusion in the National Register all Native American cultural items and other historic properties within the recreation areas and other lands that are the subject of this action and that appear to qualify for inclusion in the National Register (App. 90-91). The Tribe is not seeking review by this Court of any question concerning this fourth claim.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. The Questions Presented Regarding The Tribe's Duty-to-Consult Claim Are of Great Public Importance, As They Vitally Affect All Indian Tribes' Ability To Preserve and Protect the Nation's Native American Heritage.

"Unfortunately, there are numerous statistics that bear testimony to the fact that a considerable amount of [Native American] cultural property has been destroyed through looting of sites." P. Gerstenblith, "Identity and Cultural Property: The Protection of Cultural Property in the United States," 75 B.U.L. Rev. 559, 564-565 (May 1995) (footnote omitted). In 1987, it was estimated that 32% of the known archaeological sites in the southwest had been damaged. *Id.* at 565 & n. 12. In 1994, the National Park Service reported more than 600 thefts of artifacts from Native American sites. *Id.* & n. 13. More recently, it has been estimated that a third of the approximately 2,000,000 Native American sites[7] located on federally owned lands have been looted. R. Iraola, "The Archaeological Resources Protection Act – Twenty-Five Years Later," 42 Duq. L. Rev. 221, 221 & n. 4 (Winter 2004).

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[7] "The two million figure may be conservative: some archaeologists estimate the number of sites on Indian and federal lands at six to seven million." Iraola, *infra*, 42 Duq. L. Rev. at 221 n. 4.

As of the mid-1980's, the sale of artifacts plundered from Native American burial sites throughout the United States was estimated to be "a billion dollar per year business." C. Amato, "Digging Sacred Ground: Burial Site Disturbances and the Loss of New York's Native American Heritage," 27 Colum. J. Envtl. L. 1, 2 & n. 2 (2002). With the advent of the Internet in the 1990's, "the trade in Native American artifacts has increased, leading to fears that the ease and anonymity of internet transactions could inspire a rise in illegal excavations." *Id.*; *see also* Antonia M. DeMeo, "More Effective Protection for Native American Cultural Property Through Regulation of Export," 19 Am. Ind. L. Rev. 1, 8-10 (1994) (chronicling the increasing values of Native American artifacts on the international art market and the extensive destruction and desecration of archaeological sites and cemeteries that have resulted from this increase).

"Accidental disturbance of burial sites is also common," given that the vast majority of such sites are unmarked. C. Amato, 27 Colum. J. Envtl. L. at 2. *See also* Jack F. Trope & Walter R. Echo-Hawk, "The Native American Graves Protection and Repatriation Act: Background and Legislative History," 24 Ariz. St. L. J. 35, 38-43 (1992) (detailing history of Indian grave disturbances and looting, commencing with the arrival of the first European settlers). In short, the theft and desecration of Native American cultural objects and remains constitutes a "unique problem," *Bonnichsen v. United States, Dep't of the Army*, 969

F. Supp. 628, 649 (D. Ore. 1997), that, despite Congress' passage of NAGPRA, continues to plague the aboriginal territories of the various tribes to this day.

As shown by the facts of this case, looting and disturbance of Native American sites continues to occur on federal lands located within the Oglala aboriginal territory, both *within* and *outside* of the boundaries of the Great Sioux Reservation. The Tribe has undertaken to enhance the preservation and protection of these sites by (1) notifying the Corps under NAGPRA of it claims of ownership and control of all Native American cultural items excavated or discovered at the subject recreational areas and other lands, and by (2) bringing this action to enjoin the WRDA transfers unless and until the Defendants comply with their duty to consult and accommodate the Tribe's concerns regarding such preservation and protection.

The D.C. Circuit's ruling on the ICCA statute of limitations question threatens to seriously undermine both the Tribe's and other Indian tribes' ability to compel the Government to consult with the affected tribes before taking actions that have an adverse impact on the protection and preservation of the Nation's Native American cultural and historic heritage in the face of the ongoing looting and accidental disturbance documented above. The ICCA, enacted in 1946, provided a "five-year window of time" in which tribes could present to the Indian Claims Commission "all of their claims against the Government *that*

accrued before August 13, 1946." *Shoshone Indian Tribe v. U.S.*, 364 F.3d 1339, 1343 (Fed. Cir. 2004) (emphasis added), *cert. denied*, 544 U.S. 973 (2005); *see* ICCA, § 12, 60 Stat. 1049, 1052 (formerly codified at 25 U.S.C. § 70k). Claims accruing before August 13, 1946 and not filed with the Commission by August 13, 1951 "cannot be submitted to any court, administrative agency, or the Congress." *Id.*, citing *Navajo Tribe v. New Mexico*, 809 F.2d 1455, 1461 (10th Cir. 1987). On the other hand, because "[t]he ICCA confined the Commission's jurisdiction to tribal claims that accrued before its 1946 enactment," *Navajo Tribe*, 809 F.2d at 1460, claims accruing *on or after August 13, 1946* can be asserted in the federal courts.

In its third claim, the Tribe seeks declaratory relief that the Corps is required to consult with and reasonably accommodate the Tribe's interests before "taking any significant actions" regarding the transfer, lease or management of the lands in question, and seeks mandamus relief to compel consultation and accommodation (App. 88-90). As Judge Tatel recognized, the third claim rests on assertions that "the lands are 'within Oglala aboriginal territory'" (App. 17), that "the Tribe has 'aboriginal interests in the lands set aside by [the 1851 Ft. Laramie Treaty] for [its] occupancy and use,' only 'a portion of which . . . eventually became the Great Sioux Reservation'" (App. 17), and that these aboriginal interests "impose on the government a 'trust responsibility' to consult with the Tribe before 'taking any significant actions'

as to the lands" (App. 17). *See OST of PRIR v. USACE*, 570 F.3d at 335 (Tatel, J.).

Given the Corps' duty to consult with the Tribe before taking significant action affecting the lands in question, the Tribe's claim did not accrue until the Corps breached this duty. Judge Tatel correctly observed that the alleged breach of duty by the Corps did not begin to occur until "2002 when the WRDA transfers began" (App. 18), *OST of PRIR v. USACE*, 570 F.3d at 336 (Tatel, J.), specifically not until February 8, 2002, when the Corps began to transfer and lease the lands to the State of South Dakota (App. 85). As Judge Tatel opined, because the Tribe's breach-of-trust-responsibility claim "could not possibly have existed in 1946 – over half a century before the government began executing the WRDA transfers without consulting the Tribe – the [ICCA] imposes no bar on its adjudication today" (App. 18). *OST of PRIR v. USACE*, 570 F.3d at 336 (Tatel, J.).

The ICCA also poses no bar to the adjudication of the Tribe's breach-of-duty-to-consult claim because "the ICC only had jurisdiction of claims against the United States *seeking monetary relief*." *Ottawa Tribe of Oklahoma v. Speck*, 447 F. Supp. 2d 835, 842 (N.D. Ohio 2006) (emphasis added); *see United States v. Dann*, 873 F.2d 1189, 1198 (9th Cir.) (ICC "simply had jurisdiction to award damages for takings or other wrongs that occurred on or before August 13, 1946"), *cert. denied*, 493 U.S. 890 (1989); *Mille Lacs Band of Chippewa Indians v. Minnesota Dep't of Natural*

Resources, 853 F. Supp. 1118, 1137 (D. Minn. 1994) (same); *see also Navajo Tribe*, 809 F.2d at 1461 (reviewing pertinent legislative history). The Tribe's breach-of-duty-to-consult claim seeks declaratory and mandamus relief, not monetary damages. Accordingly, the five-year statute of limitations of the ICCA does not apply to this claim.

The contrary conclusion of the D.C. Circuit majority rests on a fundamental misunderstanding of the Tribe's breach-of-trust-responsibility claim. The majority described this claim as "based on the assertion" that the lands in question remain "part of the Great Sioux Reservation" because "the [March 2,] 1889 Act dissolving much of the Reservation never went into effect" (App. 5-6). *OST of PRIR v. USACE*, 570 F.3d at 330. According to the majority, because the breach-of-trust-responsibility claim would require the court to decide whether the 1889 Act was "null and void" and "to treat the area as if the 1868 [Ft. Laramie] Treaty had not been modified," the claim "arose before 1946" (App. 10). *Id.* at 332.

Disagreeing with the majority, Judge Tatel correctly pointed out that "[i]n reality the [breach-of-trust-responsibility] claim rests not on the contention that the lands are within the Great Sioux Reservation . . . but rather on the assertion that the lands are 'within Oglala aboriginal territory,'" a far larger expanse of land (App. 17). *OST of PRIR v. USACE*, 570 F.3d at 335 (Tatel, J). Indeed, the majority of the lands in question (33 out of the 51 lands at issue) lie "*outside* the Great Sioux Reservation" (emphasis in

original) (App. 17). *Id.* Because "the majority of the lands at issue in the [breach-of-trust-responsibility] claim were never part of the Great Sioux Reservation and thus were entirely unaffected by the 1889 Act," this claim "clearly asserts a legal interest stemming from the Tribe's aboriginal interests in the lands, rather than the 'alleged nullity of the 1889 Act'" (App. 18). *Id.* at 336.

The majority also erred in finding that the breach-of-trust-responsibility claim was "never mention[ed]" in the Tribe's briefs to the court of appeals (App. 10). *OST of PRIR v. USACE*, 570 F.3d at 332 n. 4. The Tribe in fact argued that "Defendants owe the Tribe a trust responsibility based upon [the Tribe's] aboriginal interest in the lands at issue" (App. 167-171), quoting *OST v. USACE*, 537 F. Supp. 2d at 171. This fiduciary duty, the Tribe further argued, is similar to that recognized by a Canadian court (the British Columbia Court of Appeal) in *Haida Nation v. British Columbia*, 2002 BCCA 147,[8]

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[8] This decision was affirmed in relevant part by the Canadian Supreme Court in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511. In *Haida Nation* and the companion case of *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, the Canadian Supreme Court "unanimously established for the first time that both federal and provincial governments have a duty to consult and accommodate Aboriginal peoples when making decisions that may adversely affect unproven Aboriginal title and rights claims." Kirsten M. Carlson, "Does Constitutional Change Matter? Canada's Recognition of Aboriginal Title," 22 Ariz. J. Int'l & Comp. Law 449, 474 (Fall 2005); *see also* P.

(Continued on following page)

obligating British Columbia "to consult with and accommodate a tribe" prior to undertaking a significant action affecting lands in which the tribe has aboriginal interests (App. 38).

Having erroneously concluded that the ICCA barred the district court from hearing the Tribe's breach-of-duty-to-consult claim, the D.C. Circuit majority did not reach the issue of standing (App. 6-7). *OST of PRIR v. USACE*, 570 F.3d at 331 n. 2. In holding the Tribe lacked standing to sue, the District Court rejected the Tribe's reliance on *Haida Nation*, 2002 BCCA 147, and ruled that, because the Tribe possessed no "legally protected interest" in the Oglala aboriginal lands, it failed to allege any injury-in-fact. *OST v. USACE*, 537 F. Supp. 2d at 169-172.

Judge Tatel reached the issue of the Tribe's standing to bring its breach-of-duty-to-consult claim. He concluded that the district court's "reasoning improperly 'decid[ed] the merits under the guise of determining the plaintiff's standing'" (App. 18). *OST of PRIR v. USACE*, 570 F.3d at 336 (quoting *Inf. Handling Servs. v. Defense Aut. Printing Servs.*, 338

Manus, "Indigenous Peoples' Environmental Rights: Evolving Common Law Perspectives in Canada, Australia, and the United States," 33 B.C. Envtl. Aff. L. Rev. 1, 32 (2006) ("The Court concluded that the consultation requirement encompasses situations where government-approved activity might detrimentally impact land or natural resources to which a tribe has established only *potential* aboriginal rights and title.") (footnote omitted; emphasis in original).

F.3d 1024, 1030 (D.C. Cir. 2003)). Standing in no way depends on the merits of the plaintiff's claim. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975); *see also Meese v. Keene*, 481 U.S. 465, 473 (1987) ("whether the statute in fact constitutes an abridgment of the plaintiff's speech is, of course, irrelevant to the standing analysis"). "Whether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits." *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997). "[A]t the motion to dismiss stage, a plaintiff's non-frivolous contention regarding" the merits of the controversy "must be taken as correct for purposes of standing." *Inf. Handling Servs.*, 338 F.3d at 1030 (citations omitted).

Judge Tatel further properly determined that, "given the hornbook principle that the 'federal government has a trust or special relationship with Indian tribes,' 1-5 Cohen's Handbook of Federal Indian Law, § 5.04[4][a]," the Tribe's duty-to-consult claim "is hardly so frivolous as to justify dispensing with the normal practice of assuming its merit" for purposes of standing (App. 18-19). *OST of PRIR v. USACE*, 570 F.3d at 336. Judge Tatel referred to the federal courts' recognition of the existence of a guardian-ward relationship between the Government and the Indian tribes (App. 19). *Id.*; *see United States v. Sioux Nation of Indians*, 448 U.S. at 415; *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935); *Littlewolf v. Lujan*, 877 F.2d 1058, 1063 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1043 (1990). As part of

this relationship, "[t]raditionally, the courts have enforced trusteeship duties . . . against executive branch officers, usually under a common law fiduciary theory." *Littlewolf*, 877 F.2d at 1064, citing *Seminole Nation v. U.S.*, 316 U.S. 286 (1942). "[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."[9] *Seminole Nation*, 316 U.S. at 297.

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[9] This fiduciary relationship "has been described as 'one of the primary cornerstones of Indian law,' F. Cohen, Handbook of Federal Indian Law 221 (1982), and has been compared to one existing under a common law trust, with the United States as trustee, the Indian tribes or individuals as beneficiaries, and the property and natural resources managed by the United States as the trust corpus." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11 (2001). The trust corpus in this case is comprised of the Native American cultural items excavated or discovered at the recreational areas and other lands that are the subject of this action to which the Tribe claims ownership and control under NAGPRA.

Moreover, while "the parameters of the duty to consult have not been well-defined by the judiciary, where federal activities affect trust resources, tribes should be entitled to greater involvement than the due process rights afforded non-Indians." S. Zellmer, "Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First," 43 S.D. L. Rev. 381, 389-90 (1998); *see Northwest Sea Farms v. United States Army Corps of Engineers*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996) (although agency's regulations do not specifically require consideration of treaty rights as part of "public interest" review mandated by statute, trust and treaty obligations provided agency with authority to do so; Corps must ensure that treaty rights are given full effect); *Northern Cheyenne Tribe v. Hodel*, 12 Ind. L. Rep. 3065, 3070 (D. Mont.

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Having found that the Tribe showed a legally protected interest, Judge Tatel proceeded to address the remaining two requirements for standing: "whether [1] the challenged conduct injures the Tribe's claimed (and non-frivolous) legal interest in a direct, concrete, and particularized way [2] that a court order would redress" (App. 19). *OST of PRIR v. USACE*, 570 F.3d at 336. First, he concluded that the injuries to the Tribe's legal interest were caused by actions of the Corps, because the Corps' "failure to consult with the Tribe before proceeding with the WRDA transfers deprived the Tribe of its alleged procedural right to be consulted" (App. 19). *Id.* He further properly determined that the Tribe's procedural right to be consulted was "redressable where, as here, 'there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant,'" quoting *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (App. 19-20). *Id.*

1985) (Interior Department's procedural duty to consult with tribes regarding impact on trust and treaty rights is violated if tribes are treated like mere citizens), *remanded for modification of injunction*, 851 F.2d 1152 (9th Cir. 1988). "[I]n practical terms, a procedural duty has arisen from the trust relationship such that the federal government must consult with an Indian tribe in the decision-making process to avoid adverse effects on [trust or] treaty resources." *Klamath Tribes v. United States*, 1996 WL 924509, at *8 (D. Or. Oct. 2, 1996) (No. 96-381-HA) (holding that Forest Service must consult with Tribe and consider effects of timber harvest on mule deer and other tribal resources).

Thus, to enable the Tribe and other Indian bands to preserve the country's unique and irreplaceable Native American heritage, the Court should grant the Petition and, in accordance with Judge Tatel's dissent, hold that the ICCA does not bar the Tribe's duty-to-consult claim, and that the Tribe has standing to pursue that claim. These questions should be addressed by this Court now, since in the not too distant future the items of cultural property in question will be gone or irreparably damaged. *Cf.* Gerstenblith, 75 B. U.L. Rev. at 565 ("By the time society decides in twenty or thirty years that these [Native American cultural] resources are also important, they will be gone or irreparably injured.")

II. The ICCA Does Not Bar Jurisdiction Over The Tribe's Great Sioux Reservation Boundaries Claims.

The Tribe's first two claims are based on the allegation that "the 1889 Act dissolving much of the [Great Sioux] Reservation *never went into effect* because the Crook Commission failed to obtain valid signatures from three-fourths of the adult male Sioux population" (App. 5-7, 10, 72-74) (emphasis added). *OST of PRIR v. USACE*, 570 F.3d at 330. The appeals court majority ruled that these claims fall under § 2(3) of the ICCA, "encompass[ing] 'claims which would result if the treaties, contracts, and agreements between the claimant and the United States *were revised* on the ground of fraud, duress, unconscionable consideration, mutual or unilateral

mistake, whether of law or fact, or any other ground cognizable by a court of equity'" (App. 9-10). *Id.* at 332 (emphasis added), quoting ICCA, § 2(3), 60 Stat. 1050, formerly codified at 25 U.S.C. § 70a(3) (repealed). The majority reasoned that the first two claims "would require the court to decide whether *to rescind* the Sioux Tribe's agreements with the United States approving the 1889 Act's diminishment of the Great Sioux Reservation" (App. 10). *Id.* (emphasis added).

The term "revised" as used in § 2(3) is undefined, but "revise" has generally been accorded the meaning "to review, re-examine *for correction*; to go over a thing *for the purpose of amending, correcting, rearranging, or otherwise improving it.*" Black's Law Dictionary 1484 (4th ed. 1968) (emphasis added); *see also* Webster's Third New Intern. Dictionary 1944 (1976) (revise means "to make a new, amended, improved, or up-to-date version of"). Given the grounds set forth in § 2(3) for revisions, "revised" is used in much the same sense as "reformed", i.e., the equitable remedy of reformation. *See* Black's Law Dictionary 1446 (reform means "[t]o correct, rectify, amend, remodel. Instruments *inter partes* may be *reformed*, when defective, by a court of equity") (emphasis in original).

The Tribe is not seeking to revise or reform any agreements between the Sioux Tribes and the United States. Rather, the Tribe contends that no valid agreements to approve or consent to the 1889 Act were ever entered into, because the Crook Commission obtained no more than 3,942 valid signatures on

the quitclaim deeds, or less than 4,259 signatures, the required three-fourths of the adult male members of the bands and tribes signatory to the 1868 Treaty (App. 69-75). Alternatively, the Tribe is seeking to rescind the quitclaim deeds – to declare the deeds void from their inception and to put an end to them "as though [they] never were," Black's Law Dictionary 1471 (4th ed. 1968) – on the grounds that facially valid signatures were obtained by duress, coercion, fraud and bribery (App. 129-130).

These claims do not fall within the fair meaning of "revised" as used in § 2(3) of the ICCA. Nor do they, as the appeals court majority suggested (App. 9), *OST of PRIR v. USACE*, 570 F.3d at 332 n. 3, fall within § 2(5) of the Act, referring to claims "based upon fair and honorable dealings *that are not recognized by any existing rule of law or equity*." 60 Stat. 1050, 25 U.S.C. § 70a(5) (repealed) (emphasis added). Finally, to the extent the Tribe's boundaries claims arise under the laws and treaties of the United States, *see* ICCA § 2(1), 60 Stat. 1050, specifically the challenged WRDA transfers' violation of Article 12 of the 1868 Fort Laramie Treaty, Judge Tatel correctly recognized that those claims did not accrue until the transfers were initiated in 2002 and are therefore not subject to the ICCA (App. 18). *OST of PRIR v. USACE*, 570 F.3d at 335 (Tatel, J.) (the Tribe's second claim "focuses on the unlawfulness of the current WRDA transfers, not on the government's failure to remedy a historical wrong").

More fundamentally, jurisdiction exists over the Tribe's Great Sioux Reservation boundaries claims because the ICCA does not bar suits to determine a reservation's boundaries. *See Navajo Tribe*, 809 F.2d at 1475. While conceding this is "generally true," the majority determined that a reservation boundary claim is still subject to the ICCA where the adjudication of such a claim requires a treaty, contract or agreement between a tribe and the United States to be "revised" (App. 11-12). *OST of PRIR v. USACE*, 570 F.3d at 333. As discussed above, however, the resolution of the Tribe's reservation boundary claims will not "revise" any treaty, contract or agreement between the Tribe and the Government, but rather will either (1) declare that no agreement between the Sioux Tribes and the United States to consent to the 1889 Act was ever entered into, given the lack of the requisite signatures of three-fourths of all adult male Sioux on the quitclaim deeds, or (2) rescind (not revise) any such agreement based on signatures being obtained through coercion, fraud or bribery.

Thus, the Court should grant the Petition to reach and decide the questions regarding the application of the ICCA to the Tribe's Great Sioux Reservation boundaries claims, as those questions, like those involving the Tribe's breach-of-duty-to-consult claim, are of great public importance and central to the ability of Indian tribes to preserve and protect the Nation's Native American cultural and historic heritage.

III. The Tribe Has Standing To Pursue Its Great Sioux Reservation Boundaries Claims.

The D.C. Circuit majority did not reach the issue of whether the Tribe has standing to pursue its Great Sioux Reservation boundaries claims, as it erroneously concluded that the ICCA bars jurisdiction of these claims (App. 6-7). *OST of PRIR v. USACE*, 570 F.3d at 331 n. 2. Judge Tatel did reach this issue, determining that the Tribe lacked standing to sue because the boundaries claims are "so transparently 'frivolous'" the court need not assume their merit for purposes of evaluating standing (App. 16). *Id.* at 335 (Tatel, J.). Judge Tatel reasoned that, because the WRDA provides that transfers authorized by that Act have no effect on existing reservation boundaries, the WRDA transfers do not trigger the right under the 1868 Treaty to approve "cessions" of reservation land. *Id.*

While the WRDA transfers do not affect the "external boundaries" of any Indian reservation, *see* Pub. L. No. 106-53, § 607(a)(4), 113 Stat. 269, 395, they do adversely affect the Tribe's legally protected interests (as well as those of the other Sioux Tribes) in the cultural resources of the reservation lands that are being transferred from the United States to the State of South Dakota. NAGPRA, which broadly applies to "tribal lands," i.e., "all lands within the exterior boundaries of an Indian reservation," 25 U.S.C. § 3001(15)(A), "confirms a tribe's interest in cultural property eligible for protection under the laws." *Quechan Indian Tribe v. U.S.*, 535 F. Supp. 2d

1072, 1097-1098 (S.D. Cal. 2008), citing 25 U.S.C. § 3002.

Moreover, while the lands in question are federal fee lands, not lands held in trust for the Sioux Tribes, the cultural resources on these lands are the trust property of the Tribe and the other Sioux tribes under NAGPRA. The United States' "functional obligations" over cultural resources management on tribal lands extend to "federally-owned fee lands within an Indian reservation" and give rise to a fiduciary relationship between the Tribe and the United States.[10] *See Quechan Ind. Tribe*, 535 F. Supp. 2d at 1109 ("[T]he various federal statutes aimed at protecting Indian cultural resources, located both on Indian *and public land*, demonstrate the government's comprehensive responsibility to protect those resources and, thereby establishes a fiduciary relationship.") (emphasis added), citing *Bear Medicine v. United States*, 241 F.3d 1208, 1218 (9th Cir. 2000). Creation of the Great

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[10] Federal statutes imposing these "functional obligations" are as follows: the Archeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm, which discusses archeological resources both on public and Indian lands; the American Antiquities Act, 16 U.S.C. § 433, protecting historic ruins and objects of antiquity on lands owned or controlled by the government; the Archaeological Historic and Preservation Act, 16 U.S.C. §§ 469-469c-2, preserving historical and archeological data from irreparable loss or destruction caused by alteration of the land resulting from Federal construction project or federally licensed activity; and the NHPA, 16 U.S.C. §§ 470-470x-6, which requires preservation of historic properties controlled or owned by the United States.

Sioux Reservation itself also created a trust relationship between the United States and the Sioux Tribes. *See Quechan Ind. Tribe*, 535 F. Supp. 2d at 1109-10, where in response to plaintiff's argument that "the creation of the [Fort Yuma] Reservation establish[ed] a trust relationship between the United States and the Quechan," the district court stated that this Court "has recognized the existence of a trust relationship between the United States and Indian tribes . . . requir[ing] the government's conduct in its dealings with Indian tribes to be judged 'by the most exacting fiduciary standards,'" quoting *Seminole Nation*, 316 U.S. at 297.

No such fiduciary relationship exists between the Indian tribes and the transferor of the WRDA transfers, namely the State of South Dakota. The transfers terminate the special fiduciary relationship between the United States and the Tribe regarding protection of the Tribe's cultural resources on the lands transferred, adversely affecting the Tribe's interests in those resources. The transfers are therefore a "cession" of territory within the Great Sioux Reservation that triggers the obligation under the 1868 Treaty to obtain the consent of the affected tribes, including the Oglala Sioux Tribe. The Government's failure to obtain the consent of the Sioux Tribes, including the Oglala Sioux Tribe, before proceeding with the WRDA transfers deprived the Tribe of its legally protected interests in cultural resources on the lands so transferred, including its rights as one of the beneficiaries of the special

fiduciary relationship that exists between the United States and the Sioux Tribes regarding the protection of cultural resources on federal fee lands within the Great Sioux Reservation. This injury is clearly redressable by enjoining Defendants from completing the transfers unless and until the consent of the Sioux Tribes is first obtained in the manner prescribed by Article 12 of the 1868 Treaty.

Thus, the Court should grant the Petition and hold that the Tribe has standing to pursue its Great Sioux Reservation boundaries claims, a question of great public importance vitally affecting the Sioux tribes' ability to protect and preserve this country's Native American cultural and historic heritage.

CONCLUSION

In view of the arguments and authorities set forth above, the Petitioner, the Oglala Sioux Tribe, respectfully requests that this Court grant this Petition and issue a writ of certiorari to the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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Attorney for Petitioner

United States Court of Appeals,
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 12, 2009 Decided June 26, 2009

No. 08-5133

OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION,
Appellant

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,
Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 1:01-cv-02679-GK)

Mario Gonzalez argued the cause for appellant. With him on the briefs was *Patricia Marks*.

Robert J. Lundman, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief was *Katherine Hazard*, Attorney. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Before: HENDERSON and TATEL, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* RANDOLPH.

Opinion concurring in part, concurring in the judgment in part, and dissenting in part filed by *Circuit Judge* TATEL.

RANDOLPH, *Senior Circuit Judge*: The Great Sioux Reservation once encompassed the western half of present-day South Dakota. This case deals with several federal government properties located along the Missouri River within the area of the former Great Sioux Reservation. The Oglala Sioux Tribe brought this action seeking a declaration that the 1889 Act of Congress dissolving the Great Sioux Reservation never took effect. In addition, the Tribe requested an injunction preventing the United States from transferring title to any land inside the former Reservation without the Tribe's permission, and a writ of mandamus compelling the Army Corps of Engineers to evaluate the Missouri River properties for inclusion in the National Register of Historic Places.

I.

In 1866, representatives of the United States met with leaders of the Sioux tribes at Fort Laramie, in present-day Wyoming, to negotiate a right of passage for settlers and military personnel through Sioux territory. Negotiations broke down, and the Sioux, led by the Oglala chief Red Cloud, fought a series of battles against the U.S. Army for control of Wyoming's Powder River Basin. In 1868, the two sides met again at Fort Laramie, this time signing a

peace treaty establishing the Great Sioux Reservation. The treaty provided that the Sioux tribes would enjoy "absolute and undisturbed use and occupation" of the Reservation and prohibited unauthorized non-Indians from entering the land. Treaty with the Sioux Indians, art. 5, Apr. 29, 1868, 15 Stat. 635. The treaty also provided that "[n]o treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same. . . ." *Id.* art. 12.

After the discovery of gold in the western portion of the Great Sioux Reservation in 1874 and more battles between the U.S. Army and the Sioux (including the Battle of Little Big Horn), Congress passed a law in 1877 providing for the cession to the United States of more than 7 million acres of Reservation land in the Black Hills area of western South Dakota. *See* Act of Feb. 28, 1877, 19 Stat. 254; *United States v. Sioux Nation of Indians,* 448 U.S. 371, 374-84 (1980). The Act of March 2, 1889, ch. 405, 25 Stat. 888, passed only months before South Dakota was admitted as a State, purported to dissolve the Great Sioux Reservation, restoring roughly 9 million acres of land to the public domain and dividing the remaining territory into six smaller reservations for the various Sioux tribes. The Act was to take effect only when consent had been obtained from three-fourths of all adult male Sioux in

accordance with the 1868 Fort Laramie Treaty, an event to be "made known by proclamation by the President of the United States, upon satisfactory proof presented to him . . . and upon failure of such proof and proclamation this act becomes of no effect and null and void." Act of March 2, 1889 § 28. A three-member commission appointed by the Secretary of the Interior (the "Crook Commission") obtained the requisite number of signatures on quitclaim deeds and submitted a report to President Benjamin Harrison. In 1890 President Harrison issued a proclamation declaring the Act to be in full force.

Non-Indian settlers later gained title to much of the former Great Sioux Reservation land. Thereafter, the Army Corps of Engineers acquired portions of former Reservation land from Indian and non-Indian owners in order to build dam and reservoir projects and more than one hundred shoreline recreational areas along the Missouri River. *See* Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887. The Water Resources Development Act of August 17, 1999, Pub. L. 106-53, 113 Stat. 269, directed the Secretary of the Army to transfer title to or grant perpetual leases for many of these federal properties to the State of South Dakota, the Cheyenne River Sioux Tribe, and the Lower Brule Sioux Tribe.

The Oglala Sioux Tribe filed its initial complaint in December 2001, seeking to enjoin the transfers of these Missouri River properties. The complaint contained several claims under the National Historical Preservation Act, 16 U.S.C. §§ 470-470x-6, and other

cultural and environmental resource protection statutes. In a previous lawsuit, the Crow Creek Sioux Tribe had filed a complaint making essentially the same claims. In *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 916-17 (D.C. Cir. 2003), we determined that the resource protection statutes continued to apply to the Missouri River properties even after their transfer. Thus, the Crow Creek Tribe had suffered no injury and lacked Article III standing to challenge the transfers. *Id.*

After our decision in *Crow Creek*, the district court ordered the Oglala Sioux Tribe to show cause why their case should not be dismissed for lack of subject matter jurisdiction. The Tribe amended its complaint, dropping its prior claims and asserting four new or modified ones. The first three were based on the assertion that the Tribe had an interest in the Missouri River properties because those properties are part of the Great Sioux Reservation, an interest allegedly never diminished or altered by any act of Congress.[1] Specifically, the Tribe alleged that the

[1] In the Tribe's first claim for relief, it sought a declaratory judgment that the Great Sioux Reservation has never been diminished by any Act of Congress. In its second claim for relief, it sought a declaratory judgment to the effect that the transfers and leases of federal property were without force and effect and an injunction against further transfers. In its third claim for relief, it sought a declaratory judgment that the Army was required to consult with and reasonably accommodate the Tribe before taking any action regarding transfer or management of the properties and mandamus relief compelling such consultation and accommodation. *See* Pet'r Br. at 21-22.

1889 Act dissolving much of the Reservation never went into effect because the Crook Commission failed to obtain valid signatures from three-fourths of the adult male Sioux population. The Tribe's last claim sought mandamus relief requiring the Army Corps of Engineers to evaluate, inventory, and include in the National Register of Historic Places all Native American cultural items and historic areas within the Missouri River properties. Pet'r Br. at 22. The district court dismissed the complaint, ruling that the Tribe lacked standing to bring its first three claims and that mandamus relief could not be granted on its fourth claim. The court determined that, regardless of the fairness or propriety of the ratification, the 1889 Act had taken effect and abrogated any rights held by the Tribe based on the 1868 Fort Laramie Treaty. Accordingly, the Tribe did not have a legally protected interest in the lands at issue. The court also ruled that mandamus relief was inappropriate because the Corps had no plainly prescribed duty to evaluate federal properties in the manner requested by the Tribe.

II.

Congress has expressly deprived courts of jurisdiction over the subject matter of the Tribe's first three claims.[2] Each of these claims rests on the

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[2] We therefore do not reach the question whether the Tribe has standing to sue. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92, 97 n.2 (1998); *Block v. Cmty. Nutrition Inst.*, 467

(Continued on following page)

contention that the United States did not validly implement the 1889 Act, rendering it a nullity. In 1946, the Indian Claims Commission Act, Pub. L. No. 79-726, 60 Stat. 1049 (1946), imposed a 5-year limitations period on Indian claims in law and equity then existing and arising under the Constitution, federal law, and treaties between Indian tribes and the United States. The Act's limitations period applies here.

Before 1946, tribes were unable to pursue claims against the federal government without express congressional authorization. *Otoe & Missouria Tribe of Indians v. United States*, 131 F. Supp. 265, 272 (Ct. Cl. 1955); *see Cohen's Handbook of Federal Indian Law* 443 (2005 ed.). The 1946 Act created the Indian Claims Commission to adjudicate all claims accruing before its effective date, August 13, 1946. Congress's intention was to "draw [ ] in all claims of ancient wrongs, respecting Indians, and to have them adjudicated once and for all." *Temoak Band of W. Shoshone Indians, Nev. v. United States*, 593 F.2d 994, 998 (Ct. Cl. 1979); *see United States v. Dann*, 470 U.S. 39, 45-46 (1985). Congress deliberately used broad terminology in the Act in order to permit tribes to bring all potential historical claims and to thereby prevent them from returning to Congress to lobby for further redress. *Otoe & Missouria Tribe*, 131 F. Supp.

U.S. 340, 353 n.4 (1984); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 101 (1979); *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972).

at 272; *see* Indian Claims Commission Act § 2; *Cohen's Handbook of Federal Indian Law* 445 (2005 ed.) (citing H.R. Rep. No. 79-1466, 79th Cong., 1st Sess. 10 (1946)). To balance this permissiveness and to ensure finality, the Act established a 5-year limitation on all claims existing before 1946; any claim not presented within the 5-year period may not be submitted to any court or administrative agency. Indian Claims Commission Act § 12; *see Pueblo of Santo Domingo v. United States,* 16 Cl. Ct. 139, 142 (1988); *Minn. Chippewa Tribe v. United States* (Minn. Chippewa Tribe), 11 Cl. Ct. 534, 536 (1987).

It is well established that the Indian Claims Commission Act bars claims involving allotments or other property, claims involving title, claims to equitable relief, claims for damages, and related constitutional and procedural claims that accrued before 1946 and were not brought by August 13, 1951. *See Oglala Sioux Tribe of Pine Ridge Indian Reservation v. United States,* 650 F.2d 140, 141-42 (8th Cir. 1981); *Navajo Tribe of Indians v. New Mexico,* 809 F.2d 1455, 1463-64 (10th Cir. 1987); *Minn. Chippewa Tribe Red Lake Band v. United States (Red Lake Band),* 768 F.2d 338, 341-42 (Fed. Cir. 1985); *Minn. Chippewa Tribe,* 11 Cl. Ct. at 536; *Snoqualmie Tribe of Indians v. United States,* 372 F.2d 951, 959 (Ct. Cl. 1967); *W. Shoshone Nat'l Council v. United States,* 279 Fed. Appx. 980, 988 (Fed. Cir. 2008); *Catawba Indian Tribe of S.C. v. United States,* 24 Cl. Ct. 24, 29-30 (1991); *Pueblo of Santo Domingo,* 16 Cl. Ct. at 141-42; *Hannahville*

Indian Cmty. v. United States, 4 Cl. Ct. 445, 461 (1983); *Six Nations Confederacy v. Andrus,* 610 F.2d 996, 998 (D.C. Cir. 1979). A tribe cannot avoid the Indian Claims Commission Act through "artful pleading." *Cf. Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands,* 461 U.S. 273, 285 (1983) (citing *Brown v. GSA,* 425 U.S. 820, 833 (1976)); *United States v. Mottaz,* 476 U.S. 834, 847-48 (1986). It cannot obtain review of a historical land claim otherwise barred by the Act by challenging present-day actions involving the land. *Catawba Indian Tribe,* 24 Cl. Ct. at 29-30. Nor can it circumvent the statutory limitation by styling its grievances as claims for equitable relief against federal officers in their individual capacities, *see* Pet'r Reply Br. at 19. If the Tribe's essential claim is time-barred, reaching these "officer suits" would mean that the Tribe could litigate claims arising before 1946, in direct defiance of Congress's intent in passing the Act. *Cf. Block,* 461 U.S. at 284-85; *Mottaz,* 476 U.S. at 846-47.

The Oglala Sioux Tribe's claims fall under § 2 of the Indian Claims Commission Act, most directly under provision (3), which encompasses "claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground

cognizable by a court of equity."[3] The Tribe's first three claims would require the court to decide whether to rescind the Sioux Tribe's agreements with the United States approving the 1889 Act's diminishment of the Great Sioux Reservation, to declare that Act null and void, and to treat the area as if the 1868 Treaty had not been modified.[4] The Tribe surely knew that such an action arose before 1946. *Cf. Cheyenne Arapaho Tribes of Okla. v. United States*, 558 F.3d 592 (D.C. Cir. 2009); *Warren v. United States*, 234 F.3d 1331, 1335 (D.C. Cir. 2000). Not only did the 1889 Act purport to divest the Sioux tribes of title to millions of acres of land, but it explicitly returned the land to the public domain and

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[3] The Tribe's claims also arise under the laws and treaties of the United States, *see* Indian Claims Commission Act § 2(1), and are "based upon [a lack of] fair and honorable dealings," *id.* § 2(5).

[4] Judge Tatel construes the third claim as asserting that the government owes the Tribe a permanent fiduciary duty of consultation before taking any significant action on any land the Tribe has *ever* occupied. This is a novel theory, having no support in federal Indian law, and it is a theory the Tribe itself never mentions in its briefs in this court. The Tribe's argument was instead that it retained an unbroken "aboriginal interest" in its ancestral lands due to the alleged nullity of the 1889 Act. *See, e.g.*, Appellant Br. at 46-47 ("[The 1889 Act] did not, in clear and plain language, either terminate the Great Sioux Reservation or diminish its borders. Consequently, the Tribe still retains and may assert a valid aboriginal interest in the recreational and other lands at issue in this case."). Thus, the claim the Tribe does make-as distinguished from the one Judge Tatel offers-depends upon our resolution of a dispute arising in 1890. As such, it is barred by the Indian Claims Commission Act.

divested it of its reservation status. Act of March 2, 1889, ch. 405, § 21; *see, e.g., DeCoteau v. Dist. Co. Ct. for Tenth Judicial Dist.*, 420 U.S. 425, 446 (1975). A court cannot, 120 years later, adjudicate the validity of the quitclaim deeds and agreements between the Sioux tribes and the United States without violating both the letter and the intent of the Indian Claims Commission Act. As the Eighth Circuit stated in rejecting an analogous claim by the Oglala Sioux concerning a different portion of the former Great Sioux Reservation, "Congress has deprived the district court of subject matter jurisdiction by expressly providing an exclusive remedy" and thereby barring "any other form of relief." *Oglala Sioux Tribe*, 650 F.2d at 142-43; *see also Six Nations Confederacy*, 610 F.2d at 998.

The Tribe answers that the Indian Claims Commission Act does not bar suits to determine a reservation's boundaries. This is generally true, but the Tribe puts the matter much too broadly. The reservation boundary cases do not run afoul of the Indian Claims Commission Act because the courts were being called upon to interpret federal legislation and executive orders, not to set these sources aside or to treat them as void on the basis of centuries-old flaws in the ratification process. In the words of the Act, the cases do not involve "claims which would result if the treaties, contracts, and agreements between the claimant and the United States were

revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake."[5] But that is precisely what the Tribe's first three claims do involve.

III.

As to the Tribe's fourth claim, the Army Corps of Engineers does not contest the Tribe's Article III standing to request relief in the nature of mandamus. The question is whether such relief can be granted under the Mandamus Act, 28 U.S.C. § 1361. The Tribe alleged that the Corps owed it a duty under the National Historical Preservation Act to "locate, inventory and nominate for inclusion in the National Register all Native American cultural items and other historic properties within the recreation areas and other lands" in the former Great Sioux Reservation. Pet'r Br. at 22.

Mandamus is a "drastic" remedy available only in "extraordinary situations." *Kerr v. U.S. Dist. Court for*

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[5] *See* Indian Claims Commission Act § 2(3). None of the Supreme Court's Indian reservation cases addresses *any* dispute between a tribe and the United States, whether over the validity of agreements or otherwise. Rather the cases involve jurisdictional disputes between a tribe and a state government, disputes the Court resolves by interpreting federal laws. *See, e.g., South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329 (1998); *Hagen v. Utah,* 510 U.S. 399 (1994); *Solem v. Bartlett,* 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977); *DeCoteau,* 420 U.S. at 425; *Mattz v. Arnett,* 412 U.S. 481 (1973); *Seymour v. Superintendent of Wash. State,* 368 U.S. 351 (1962).

N. Dist. of Cal., 426 U.S. 394, 401 (1976); *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc). A plaintiff seeking mandamus relief has the burden of showing that the defendant owes it a "clear and compelling" duty, *Cheney*, 406 F.3d at 729; *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988), a duty "so plainly prescribed as to be free from doubt and equivalent to a positive command," *Consol. Edison Co. of N.Y., Inc. v. Ashcroft*, 286 F.3d 600, 605 (D.C. Cir. 2002) (quoting *Wilbur v. United States*, 281 U.S. 206, 218-19 (1930)).

The National Historical Preservation Act establishes no clear duty for agencies to evaluate potentially historic sites within a certain time frame or in a certain manner. Rather it provides that, before approving any federal project, federal agencies will "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f. Agencies also "shall establish . . . a preservation program for the identification, evaluation, and nomination to the National Register of Historic Places, and protection of historic properties," which must ensure "that historic properties under the jurisdiction or control of the agency, are identified, evaluated, and nominated to the National Register." *Id.* § 470h-2(a)(2)(A). The Tribe does not allege that the Corps has failed to establish an historical preservation program. Nor does it point to any particular statutory duty or command. Instead the Tribe claims that the Corps

has failed to act quickly and effectively enough to ensure that the historical properties under its jurisdiction are safe. A court cannot grant mandamus relief on the basis of general objections to agency policies or complaints about the timeliness of agency actions. Because the Tribe did not come close to demonstrating that the Act imposes a clear and compelling duty on agencies to evaluate all historic properties under their jurisdiction on any particular timetable, the district court had no choice but to dismiss its mandamus claim.

Affirmed.

TATEL, *Circuit Judge*, concurring in part, concurring in the judgment in part, and dissenting in part: Given the court's blanket characterization of the Tribe's first three claims for relief, *see* Maj. Op. at 4-5, 6, a little clarification is in order. The Tribe's first claim alleges that the boundaries of the Great Sioux Reservation remain intact despite the 1890 presidential proclamation to the contrary, and it seeks a declaration to this effect. Second Am. Compl. ¶¶ 51-56. Its second claim alleges that certain transfers of land under Title VI of the Water Resources Development Act (WRDA), Pub. L. No. 106-53, §§ 601-09, 113 Stat. 269, 385-97 (1999), *as amended by* Pub. L. No. 106-541, § 540, 114 Stat. 2572, 2664-71 (2000), violate the Tribe's 1868 Fort Laramie Treaty right to consent to any "cession" of land within the Great Sioux Reservation, *see* Treaty

with the Sioux Indians, art. XII, Apr. 29, 1868, 15 Stat. 635. Second Am. Compl. ¶¶ 57-62. The third claim alleges that the WRDA transfers violate the government's separate "trust responsibility" to consult with the Tribe before taking any "significant actions" related to its aboriginal land. *Id.* ¶¶ 63-67.

On appeal the Tribe effectively abandons the first of these as an independent claim for relief. *See* Appellant's Reply Br. 20 ("[T]he Tribe is not seeking to obtain judicial review of, or otherwise to challenge, the 1890 proclamation under the APA. [T]he Tribe is seeking . . . the determination of a question of law that must necessarily be determined in order to adjudicate its Second Claim for Relief."); *see also id.* at 12 (arguing that the Tribe has standing to sue only for "any and all recently inflicted wrongs and injuries"); *id.* at 16. Given that, we needn't address the claim at all.

As to the Tribe's second claim, the 1889 Act, the 1890 proclamation, and the resulting alienation of lands within the Great Sioux Reservation are no doubt historical facts. *See* Maj. Op. at 8-9. But unlike the case the court cites for the proposition that the Tribe "cannot obtain review of a historical land claim otherwise barred by the [Indian Claims Commission] Act by challenging present-day actions involving the land," *id.* at 7, the second claim focuses on the unlawfulness of the current WRDA transfers, not on the government's continuing failure to remedy a historical wrong. *Cf. Catawba Indian Tribe of S.C.*

v. United States, 24 Cl. Ct. 24, 29-30 (1991) (post-1946 claims barred where they allege only government's ongoing failure to remedy an 1840 cession of reservation land). Rather than rely on the at best questionable effect of the Indian Claims Commission Act, I would affirm the second claim's dismissal for a more basic reason – that the Tribe lacks standing to pursue it. The Tribe insists that the 1868 Fort Laramie Treaty entitles it to approve the WRDA transfers and claims that the government has deprived it of this right by transferring the lands unilaterally. But this claim is so transparently "frivolous" that we needn't assume its merit for purposes of evaluating standing. *See La. Energy & Power Auth. v. FERC,* 141 F.3d 364, 368 & n.6 (D.C. Cir. 1998) (claim's merits are assumed when evaluating standing unless "entirely frivolous"); *see also Info. Handling Servs., Inc. v. Def. Automated Printing Servs.,* 338 F.3d 1024, 1030 (D.C.Cir.2003) (only "non-frivolous contention[s] regarding the meaning of a statute must be taken as correct for purposes of standing"). The WRDA itself makes abundantly clear that these transfers have no effect on existing reservation boundaries. *See* Pub. L. No. 106-53, § 607(a)(4), 113 Stat. 269, 395 ("Nothing in this title diminishes or affects . . . any external boundary of an Indian reservation of an Indian Tribe."). Thus, to the extent the lands at issue are reservation lands, they will remain so even after transfer. As a result, no WRDA transfer, unilateral or otherwise, even implicates – let alone harms – the treaty right to approve "cessions" of reservation land.

As to the Tribe's third claim, the court sweeps it out with the first two, describing it as "based on the assertion" that these lands are still "part of the Great Sioux Reservation" despite the 1889 Act and the 1890 proclamation to the contrary. Maj. Op. at 4-5. And because the Indian Claims Commission could have adjudicated the effect of the 1890 proclamation on the reservation boundaries in 1946, the court concludes, the claim amounts to nothing more than a "historical land claim" that the Tribe may not litigate now, *id.* at 7. I disagree.

In reality the third claim rests not on the contention that the lands are within the Great Sioux Reservation – indeed, the claim concerns many areas that never were, *see* Second Am. Compl. ¶ 40 (alleging that 33 of the 51 lands at issue are *outside* the Great Sioux Reservation) – but rather on the assertion that the lands are "within Oglala aboriginal territory," *id.* *See* Appellant's Opening Br. at 45 (arguing that the Tribe has "aboriginal interests in the lands set aside by [the Fort Laramie Treaty of 1851] for [its] occupancy and use," only "a portion of which . . . eventually became the Great Sioux Reservation"). This, the Tribe quite plainly argues, imposes on the government a "trust responsibility" to consult with the Tribe before "taking any significant actions" as to the lands. Second Am. Compl. ¶¶ 63-67; Appellant's Opening Br. 45-48; *see also id.* at 46 (quoting the district court's characterization of the third claim as asserting that the government "owe[s] the Tribe a trust responsibility based upon [its] aboriginal

interest in the land at issue"). And because the majority of the lands at issue in the third claim were never part of the Great Sioux Reservation and thus were entirely unaffected by the 1889 Act and the 1890 proclamation, the claim clearly asserts a legal interest stemming from the Tribe's aboriginal interests in the lands, rather than the "alleged nullity of the 1889 Act," Maj. Op. at 8 n. 4.

Although the origins of such a duty (if such a duty exists) would certainly predate 1946, the alleged breach of the duty began in 2002 when the WRDA transfers began. Thus, because this claim could not possibly have existed in 1946 – over half a century before the government began executing the WRDA transfers without consulting the Tribe – the Indian Claims Commission Act imposes no bar on its adjudication today.

Of course this conclusion raises the question of the Tribe's standing to bring this claim, which the district court rejected and my colleagues have no occasion to address. *See* Maj. Op. at 5, 6 n.2. The district court ruled that because the Tribe possesses no "legally protected interest" in the land, it failed to allege any injury-in-fact. *See Oglala Sioux Tribe v. U.S. Army Corps of Eng'rs,* 537 F. Supp. 2d 161, 169-72 (D.D.C. 2008). But that reasoning improperly "decid[ed] the merits under the guise of determining the plaintiff's standing," *Info. Handling Servs.,* 338 F.3d at 1030. Unlike the Tribe's second claim, and given the hornbook principle that the "federal government has a trust or special relationship with

Indian tribes," 1-5 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[4][a], this claim is hardly so frivolous as to justify dispensing with the normal practice of assuming its merit for now. *See Littlewolf v. Lujan,* 877 F.2d 1058, 1063 (D.C. Cir. 1989) (recognizing a general "guardian-ward relationship" between Indian tribes and the government, "deriv[ing] from the historical status of Indian tribes as 'domestic dependent nations,' and the correspondingly pervasive federal control over Indians as embodied in treaties and statutes" (quoting *Cherokee Nation v. Georgia,* 30 U.S. 1, 17 (1831))). To be sure, in light of the decades of private and government ownership of the Tribe's aboriginal territory, as well as the legacy of the Tribe's treaties with the United States, a Rule 12(b)(6) motion may get the better of this claim too. But at this stage of the litigation, the only question properly before us is whether the challenged conduct injures the Tribe's claimed (and non-frivolous) legal interest in a direct, concrete, and particularized way that a court order would redress. *See City of Waukesha v. EPA,* 320 F.3d 228, 233-35 (D.C. Cir. 2003).

Thus assuming the third claim's legal merit, I have no doubt the Tribe has standing to pursue it. The government's failure to consult the Tribe before proceeding with the WRDA transfers deprived the Tribe of its alleged procedural right to be consulted, and such procedural injuries are redressable where, as here, "there is some possibility that the requested relief will prompt the injury-causing party to

reconsider the decision that allegedly harmed the litigant," *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). I would therefore reverse the dismissal of the third claim and remand to the district court for consideration of the merits.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

OGLALA SIOUX TRIBE,	:	**Civil Action**
Plaintiff,	:	**No. 01-2679 (GK)**
	:	(Filed Mar. 17, 2008)
v.	:	
UNITED STATES ARMY CORPS OF ENGINEERS, et al.,	:	
Defendants.	:	

MEMORANDUM OPINION

On December 28, 2001, Plaintiff Oglala Sioux Tribe ("Oglala Tribe" or "Tribe") filed this action against the United States Army Corps of Engineers ("Corps"), various Corps officials, and the United States (collectively, "Defendants"). The Oglala Tribe seeks declaratory, injunctive, and mandamus relief relating to Defendants' transfer of lands and recreational areas and/or granting of perpetual leases for recreational areas in the Missouri River Basin to the South Dakota Department of Game, Fish and Parks ("South Dakota"), the Cheyenne River Sioux Tribe, and the Lower Brule Sioux Tribe under Title VI of the Water Resources Development Act of 1999 ("WRDA"), Pub. L. No. 106-53, 113 Stat. 269 (1999), *as amended by* Pub. L. No. 106-541, 114 Stat. 2572 (2000).

This matter is now before the Court on the parties' responses to the Order to Show Cause issued on July 7, 2003, which directed Plaintiff "to show

cause . . . why this case should not be dismissed for lack of subject matter jurisdiction." 7/7/03 Order at 1 ("Show Cause Order"). Upon consideration of the parties' Responses, the Plaintiff's Reply, and the entire record herein, for the reasons stated below, this case is **dismissed**.

I. BACKGROUND[1]

A. Historical Background

The Oglala Sioux Tribe is a distinct band of the Teton Division of the Sioux Nation. The Tribe consists "of approximately 41,000 citizens with territory of over 4,700 square miles in the southwestern portion of South Dakota," which includes portions of the Missouri River basin. 2d Am. Compl. at ¶¶ 2, 14. The Oglala Tribe claims that they have used and occupied some portions of the Missouri River basin "[s]ince time immemorial." *Id.* at ¶ 14 (including description of relevant portion of the basin).

In 1825, the Tribe entered into a treaty of friendship and protection with the United States. *See* 7 Stat. 252 ("1825 Treaty"). The Oglala Tribe claims

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[1] For purposes of ruling on a motion to dismiss, the factual allegations of the complaint must be presumed to be true and liberally construed in favor of the plaintiff. *Shear v. National Rifle Ass'n of Am.*, 606 F.2d 1251, 1253 (D.C. Cir. 1979). Thus, the facts set forth herein are taken from Plaintiff's Complaint, unless otherwise specified.

that under the 1825 Treaty, it became a protectorate nation of the United States. *See id.* at ¶ 18.

In 1851, the Oglala Tribe and the other bands of the Teton Division of the Sioux Nation entered into a treaty which was later ratified by Congress. 11 Stat. 749 ("1851 Treaty"). The 1851 Treaty created a defined territory for the Teton Division bands, which covered much of the area in the Missouri River basin, from the Mississippi River westward. Thereafter, United States citizens began to encroach upon the land set aside for the tribes in the 1851 Treaty.

In 1868, various Sioux bands, including the Teton band, entered into another treaty with the United States in an effort to end the struggle created by this encroachment. 15 Stat. 635 ("1868 Fort Laramie Treaty" or "1868 Treaty"). The 1868 Fort Laramie Treaty was ratified by Congress and proclaimed effective by the President in 1869. Article 2 of the 1868 Treaty designated specific territory for the various Sioux bands within the land defined in the 1851 Treaty, which became known as the Great Sioux Reservation. Under Article 12 of the 1868 Treaty, no future treaties for cessions of land in the Great Sioux Reservation would be valid "unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the [land to be ceded]." 15 Stat. 635, *as quoted in United States v. Sioux Nation of Indians,* 448 U.S. 371, 376 (1980) ("*Sioux Nation*").

In 1877, Congress ratified and confirmed a cession agreement – the Act of February 28, 1877, ch. 72, 19 Stat. 254 ("1877 Act") – that was purported to be made between the relevant Sioux bands and commissioners working on behalf of the United States. The 1877 Act ceded over 7 million acres of territory in the western portion of the Great Sioux Reservation, primarily the Black Hills region, to the United States. It was later determined that "the treaty was presented just to Sioux chiefs and their leading men. It was signed by only 10% of the adult male Sioux population[,]" not three-fourths as required by Article 12 of the Fort Laramie Treaty. *Sioux Nation,* 448 U.S. at 381-82 (ultimately determining that the United States was required to pay interest for the unconstitutional taking of land carried out through the 1877 Act).

In 1889, Congress passed legislation – the Act of March 2, 1889, ch. 405, 25 Stat. 1889 ("1889 Act") – that provided for the further, conditional diminution of the remaining portions of the Great Sioux Reservation. The 1889 Act created six smaller, distinct reservations within the Great Sioux Reservation for the various Sioux bands. In addition, it provided that all of the land not contained in those distinct reservations would be returned to the public domain of the United States and subsequently opened for settlement. However, before the 1889 Act could take effect, Congress required that the United States had to gain the "acceptance and consent" of three-fourths of all the occupying or interested adult Indian males, as

required by Article 12 of the Fort Laramie Treaty, which had to be acquired and proclaimed by the President within one year of the Act, after he was presented with "satisfactory proof" of that acceptance and consent. *See* 1889 Act, § 28.

After Congress passed the 1889 Act, the Secretary of the Interior sent a three-member commission to obtain the required acceptance and consent of the eligible Sioux males ("Sioux Commission"), which the Sioux Commission determined could be provided by the signing of a quit-claim deed. At that time, "5,678 adult male members [of the tribes] were eligible to give consent under article 12 of the 1968 Treaty and section 28 of the 1889 Act, 3,942" such that three-fourths approval would require 4,259 men to give consent. 2d Am. Compl. at ¶ 29. While the Sioux Commission collected 4,463 signatures, they "obtained no more than 3,942 valid signatures on quit claim deeds . . . [because] at least 512 of those were invalid . . . [having been provided by] non-Indian persons, . . . persons of mixed blood, . . . persons not members of the bands and tribes signatory to the 1868 Treaty, . . . underage (non-adult) Indian persons, . . . [and] female[s]," or were duplicate signatures. *Id.* In addition, the Sioux Commission obtained a "majority of the signatures . . . through coercion, fraud and bribery." *Id.* at ¶ 30.

In early 1890, the Sioux Commission submitted a report of its activities to President Benjamin Harrison. *See Report and Proceedings of the Sioux Commission,* Sen. Exec. Doc. 51, 51st Cong. 1st Sess. (1890)

("Commission Report"). The Commission Report contained a list of the names of each signatory of a quitclaim deed, which when compared with "[t]he census records contained in the [ ] Commission Report show [ ] that the Commission failed to obtain signatures from three-fourths of the adult male members eligible to give consent under article 12 of the 1868 Treaty and section 28 of the 1889 Act." 2d Am. Compl. at ¶ 31.

However, on February 10, 1890, President Harrison "proclaim[ed] the acceptance of [the 1889 Act] by the different bands of the Sioux Nation of Indians, and the consent thereto by them as required by the [1889 Act]" and stated that the 1889 Act was "declared to be in full force and effect." 26 Stat. 1554 ("1890 Proclamation"). Thereafter, "approximately one-half [of the Great Sioux Reservation that remained after the 1877 Act] was restored to the public domain . . . while six separate reservations were carved out of the remainder." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 589 (1977) (internal quotations and citations omitted) ("*Rosebud Sioux*"). One of those six reservations is the Pine Ridge Reservation of the Oglala Sioux Tribe.

B. Relevant Legislation Enacted After the 1889 Act

In response to flooding along the Missouri River in the early-to-mid twentieth century, Congress passed the Flood Control Act of 1944 ("FCA"), 33 U.S.C. §§ 701, *et seq*. The FCA authorized the Missouri River

Pick-Sloan Program, which authorized the Corps to develop a comprehensive flood control plan by constructing various dams and reservoirs along the Missouri River. After passing the FCA, "[s]even subsequent Acts of Congress authorized limited takings of Indian lands for hydroelectric and flood control dams on the Missouri River in both North and South Dakota." *South Dakota v. Bourland,* 508 U.S. 679, 683 (1993). Plaintiff alleges that to complete these various flood control programs, the Corps "acquired land [within the Great Sioux Reservation] by condemnation or by *mense conveyance* to which the Oglala Sioux Tribe was not a party, including approximately 105 shoreline recreational areas in South Dakota. 2d Am. Compl. at ¶ 37-38.

More recently, Congress passed new legislation affecting the Corps' management of the Missouri River by passing the Water Resources Development Act ("WRDA"), Pub. L. No. 106-53, 113 Stat. 269 (1999), *as amended by* Pub. L. No. 106-541, 114 Stat. 2572 (2000). Title VI of the WRDA, Pub. L. No. 106-53, §§ 601-609, called for implementation of a plan to restore terrestrial wildlife habitat that was lost due to flood-control projects along the Missouri River. Specifically, §§ 603-606 directed the Corps to transfer title or grant perpetual leases for recreational areas surrounding FCA projects to the South Dakota Department of Game, Fish and Parks and two other Sioux Tribes. Under Title VI, this transfer was to occur by January 1, 2002. *See* Pub. L. No. 106-53, § 605(a)(1)(B).

In addition, § 607 of Title VI provided that

> [n]othing in this title diminishes or affects – (1) any water right of an Indian Tribe; (2) any other right of an Indian Tribe, except as specifically provided in another provision of this title; (3) any treaty right that is in effect on the date of enactment of this Act; (4) any external boundary of an Indian reservation of an Indian Tribe; (5) any authority of the State of South Dakota that relates to the protection, regulation, or management of fish, terrestrial wildlife, and cultural and archaeological resources, except as specifically provided in this title; or (6) any authority of the Secretary, the Secretary of the Interior, or the head of any other Federal agency under a law in effect on the date of enactment of this Act, including – (A) the National Historic Preservation Act (16 U.S.C. 470 *et seq.*); (B) the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa *et seq.*); . . . (G) the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 *et seq.*);. . . .

Pub. L. No. 106-53, § 607(a). In particular, the Native American Graves Protection and Repatriation Act ("NAGPRA") "declared ownership or control of Native American human remains, associated and unassociated funerary objects, sacred objects and items of cultural patrimony ('Native American cultural items') excavated or discovered on federal or tribal lands . . . to be vested either in lineal descendants . . . or Indian tribes," while the National Historic Preservation Act

("NHPA") "provided enforceable legal protection for all historic property included in the National Register [of Historic Places] or eligible for inclusion." 2d Am. Compl. at ¶ 43, 45.

C. The Present Action

In December 2001, Plaintiff "notified the [] Corps pursuant to NAGPRA that it claims ownership and control of all Native American cultural items excavated or discovered, *inter alia,* at all of the recreational areas or other lands that are the subject of this action." 2d Am. Compl. at ¶ 44. In an attempt to stop the Corps' transfer of recreational areas as set out in the WRDA, the Oglala Tribe brought the instant action on December 28, 2001.[2] On January, 29, 2002, Plaintiff filed an Amended Complaint, as well as a Motion for a Temporary Restraining Order and Preliminary Injunction, with Judge Paul Friedman of this District.

At that time, a related case was pending before Judge Friedman, *Crow Creek Sioux Tribe v. White,* CA 01-76. The *Crow Creek* plaintiff brought an action against the Secretary of the Army and others to stop the WDRA transfer of recreation lands, arguing that

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[2] On January 28, 2002, the Rosebud Sioux Tribe moved to intervene as a party plaintiff in this action, and that motion was granted on February 12, 2002. *See* 2/12/02 Order. However, on July 14, 2003, the Rosebud Sioux Tribe moved to dismiss without prejudice its intervenor-plaintiff action, and that motion was granted. *See* 9/15/03 Order, *as amended by* 10/29/03 Order.

"transfer of the land to South Dakota would irreparably harm the Tribe's interests in cultural artifacts and tribal heritage sites by removing the lands from coverage under the federal cultural protection statutes and by lessening the federal government's ability to enforce these statutes on the transferred lands." *Crow Creek v. Brownlee,* 331 F.3d 912, 915 (D.C. Cir. 2003). On February 1, 2002, Judge Friedman held argument on *Crow Creek's* Motion for Preliminary Injunction, and denied that Motion from the bench, "holding that the proposed title transfer was consistent with the Constitution and federal law." *Crow Creek v. Brownlee,* 331 F.3d at 915; *see also* 2/1/02 Order in CA 01-76. On February 5, 2002, the *Crow Creek* plaintiff filed an emergency interlocutory appeal of Judge Friedman's denial of its motion for a preliminary injunction.

Subsequently, on or about February 8, 2002, the Oglala Tribe and Defendants began to take action with respect to the lands at issue in this case. The Oglala Tribe filed "Notices of Lis Pendens in accordance with . . . the Federal Rules of Civil Procedure . . . and the laws of the State of South Dakota, giving constructive notice of this action with respect to . . . each of the recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation," while "Defendants purported to transfer or lease to the State of South Dakota some but not all of the recreational areas and other lands that are the subject of this action." 2d Am. Compl. at ¶¶ 49-50.

On July 16, 2002, the Oglala Tribe informed the Court that it was participating as a non-party in the mediation of the related *Crow Creek* case before Judge Friedman. On August 9, 2002, Judge Friedman denied without prejudice the Oglala Tribe's Motion for a Temporary Restraining Order and Preliminary Injunction and ordered the Oglala Tribe to submit status reports regarding its involvement in the *Crow Creek* mediation. *See* 8/9/02 Order. Between October 2002 and March 2003, the Oglala Tribe submitted three such reports, each of which merely noted the Tribe's involvement in the ongoing mediation and stated that the parties were going to present a joint scheduling order for briefing in this case. *See, e.g.*, 10/1/02 Report to Court, 1/16/03 Report to Court, and 3/31/03 Report to Court

On March 17, 2003, the D.C. Circuit issued a decision regarding Crow Creek's interlocutory appeal of Judge Friedman's denial of its motion for a preliminary injunction. *See generally, Crow Creek, supra.* The D.C. Circuit found that the Crow Creek Tribe had "utterly failed to establish an 'actual or imminent' injury in fact." *Id.* at 916. Thus, the court determined that the Crow Creek Tribe "lack[ed] standing to bring [its] action in federal court" and "remand[ed] the action to the district court for entry of judgment of dismissal for lack of subject matter jurisdiction." *Id.* at 918.

On July 7, 2003, in response to the D.C. Circuit's decision in the *Crow Creek* appeal, Judge Friedman issued an order directing the Oglala Tribe to show

cause why this case should also not be dismissed for lack of subject matter jurisdiction. On July 25, 2003, the Oglala Tribe responded to the show cause, conceding that the Amended Complaint's first four claims for relief were directly addressed in the D.C. Circuit's *Crow Creek* decision and should thus be dismissed without prejudice. Plaintiff then stated that its fifth, sixth, and seventh claims for relief were still ripe because they were not addressed by the *Crow Creek* decision. Plaintiff also argued that under those remaining claims, it met the Article III standing requirements enunciated in the *Crow Creek* decision.

On August 23, 2003, this case was reassigned from Judge Friedman to this Court. Thereafter, Defendants moved to file a reply to the Oglala Tribe's show cause response, and the Oglala Tribe moved to file a second amended complaint, consistent with the claims outlined in its show cause response.

On September 15, 2003, a Status Conference was held in this matter. At that Status Conference, the Court granted the Oglala Tribe's motion for leave to file a second amended complaint and ruled that Defendants' reply to the Oglala Tribe's show cause response could present arguments for dismissal of this action on grounds of lack of subject matter jurisdiction. This matter is now before the Court on the Oglala Tribe's Response to the Order to Show Cause issued on July 7, 2003 ("Pl.'s Resp."), Defendants' Response to the Order to Show Cause ("Defs.' Resp."), and the Oglala Tribe's Reply to Defendants' Response to the Order to Show Cause ("Pl.'s Reply").

II. STANDARD OF REVIEW

It is the plaintiff's burden to establish that the court has subject matter jurisdiction to hear the case. *In re Swine Flu Immunization Prods. Liab. Litig.*, 880 F.2d 1439, 1442-43 (D.C. Cir. 1989); *Jones v. Exec. Office of the President*, 167 F. Supp. 2d 10, 13 (D.D.C. 2001). While the Court must accept as true all factual allegations contained in the complaint, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993), "plaintiff's factual allegations in the complaint . . . will bear closer scrutiny" when the court's subject matter jurisdiction has been challenged. *Grand Lodge of the Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13-14 (D.D.C. 2001) (internal quotation marks omitted). In making its determination regarding the existence of subject matter jurisdiction, the court may consider matters outside the pleadings. *Lipsman v. Sec'y of the Army*, 257 F. Supp. 2d 3, 6 (D.D.C. 2003).

III. ANALYSIS

The Oglala Tribe's Second Amended Complaint asserts four claims for relief against Defendants.

First, Plaintiff alleges that it has suffered an injury to its legally-protected interests in the recreational areas and other lands at issue in this action because of Defendants' continued "den[ial] that the boundaries of the Great Sioux Reservation have never been diminished or otherwise altered by the 1889 Act or any other subsequent treaty or act of

Congress" and Defendants' continued "refus[al] to acknowledge and abide by the 1868 Fort Laramie Treaty." 2d Am. Compl. at ¶¶ 55-56.

Second, the Oglala Tribe claims that it has suffered an injury to its legally-protected interests in the recreational areas and other lands at issue in the case based upon Defendants' past and future "transfer or lease [of the recreational areas and other lands] to the State of South Dakota pursuant to section 605 of the WRDA" without the "voluntary consent [of the relevant bands of the Sioux Nation] in accordance with article 12 of the 1868 Fort Laramie Treaty." *Id.* at ¶¶ 60-62.

Third, Plaintiff alleges that it has suffered an injury to its legally-protected interests in the recreational areas and other lands at issue in this matter based upon Defendants' failure to fulfill their "trust responsibility to the Oglala Sioux Tribe under the 1825 Treaty, 1851 Fort Laramie Treaty, 1868 Fort Laramie Treaty and federal statutory and common law" by consulting with and reasonably accommodating the view of the Tribe before transferring or leasing land to the State of South Dakota. *Id.* at ¶¶ 64-67.

Finally, Plaintiff alleges that it has suffered an injury to its legally-protected interests "in the Native American cultural items and other historic properties within the recreational areas and other lands" at issue in this case because the NHPA "requires [the Corps] to locate, inventory and nominate for inclusion

in the National Register of Historic Places" all of these items. *Id.* at ¶¶ 69-71.

Plaintiff asks for a number of specific types of relief for these alleged injuries. The Tribe seeks declarations: (1) that the 1889 Act "never became effective", *id.* at ¶ F1;[3] (2) that the transfers and leases of the recreational areas and other lands at issue that Defendants have made pursuant to the WRDA "are without force or effect", *id.* at ¶ F2; and (3) that Defendants "are required to consult with and reasonably to accommodate the views" of the Tribe in transferring, leasing, and/or managing the recreational areas and other lands at issue, *id.* at ¶ F4.

Plaintiff also requests an injunction "prohibiting Defendants from transferring any recreational areas and other lands that are subject to this action and within the borders of the Great Sioux Reservation . . . without the voluntary consent of each of the bands that were signatory to the 1868 Fort Laramie Treaty." *Id.* at ¶ F3. Finally, Plaintiff asks the Court to grant mandamus relief requiring Defendants "to consult with and reasonably to accommodate the views" of the Tribe in transferring, leasing, and/or managing the recreational areas and other lands at issue, and also "requiring [the Corps] to locate, inventory and nominate for inclusion in the National Register . . . all Native American cultural items and other historic

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[3] The Plaintiff's Prayer for Relief is denoted as Section F in the Second Amended Complaint.

properties within the recreational areas and other lands [at issue in this case]." *Id.* at ¶¶ F5, F6.

Defendants contend that Plaintiff has failed to establish Article III standing for its first three claims, arguing that the Tribe does not have legally protected interests in the recreational areas and other lands at issue under Article 12 of the 1868 Treaty. Defendants also argue that even if Plaintiff did have standing, its claims are barred by the United States' sovereign immunity and by the statute of limitations. Finally, Defendants assert that Plaintiff has failed to establish standing for, and cannot seek mandamus relief for, its fourth claim because the NHPA creates only discretionary duties that the Corps cannot be required to perform.

A. Plaintiff Lacks Standing to Bring Its First Three Claims Because It Does Not Have a Legally Protected Interest in the Recreational Areas and Other Lands at Issue.

Whether a plaintiff has standing to pursue his or her claim is a threshold question of subject matter jurisdiction. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 102 (1998). In order to establish standing under Article III, a plaintiff must demonstrate (1) "a 'concrete and particularized' injury that is 'actual or imminent,'" (2) "'caused by, or fairly traceable to, an act that the litigant challenges in the instant litigation,'" and (3) "'redressable by the

court.'" *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n,* 509 F.3d 562, 567 (D.C. Cir. 2007) (quoting *Fla. Audubon Soc'y v. Bentsen,* 94 F.3d 658, 663 (D.C. Cir. 1996)). A plaintiff's alleged injury in fact must be concrete and particularized and not conjectural, hypothetical or speculative. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992); *Sierra Club v. EPA,* 292 F.3d 895, 898 (D.C. Cir. 2002).

In this case, Plaintiff alleges that the Corps' past and future actions under Title VI of WRDA will cause it to suffer an injury in fact to its interests in the recreational areas and other lands at issue. The Oglala Tribe asserts that it has a legal interest in those lands designated in the 1868 Fort Laramie Treaty, specifically in Article 12, and that Defendants owe it a trust responsibility over those lands, as established by "the 1825 Treaty, 1851 Fort Laramie Treaty, 1868 Fort Laramie Treaty and federal statutory and common law." 2d Am. Compl. at ¶ 64.

Defendants argue that the Tribe does not have any valid legal interests in the land at issue under Article 12 of the 1868 Fort Laramie Treaty because there is no cession or treaty at issue in the Corps' transfer of lands, only Congress' unilateral action under Title VI of the WRDA. Furthermore, Defendants argue that the Tribe will sustain no present injury by the transfer of the lands at issue because Congress already chose to abrogate any interest in those lands under the 1889 Act, the FCA, and Title VI of WRDA. In response, the Oglala Tribe argues that it

does have a valid injury in fact because "the Act . . . , like many other 'surplus land acts' enacted by Congress during the late 19th and early 20th century, was not intended and therefore did not have the effect to diminish or otherwise alter the boundaries of the Great Sioux Reservation established by . . . the 1868 Fort Laramie Treaty." Pl.'s Reply at 3.

The Court recognizes the possible injustice done to the Oglala Tribe, and possibly others as well, if the Sioux Commission failed to legally collect the signatures required to make the 1889 Act legally effective. *See* 2d Am. Compl. at ¶ 31 (asserting that the Sioux Commission did not collect valid signatures from three-quarters of tribal, adult males). The Court also recognizes possible injuries that could result from the Government's alleged failure to exercise its trust responsibility to the aboriginal interests of the Oglala, and other tribes, in the lands held in the Great Sioux Reservation. *See Haida Nation v. British Columbia (Minister of Forests),* 2002 BCCA 147 (finding Canadian government officials had a responsibility to consult with and accommodate a tribe before granting a tree farm license, arising from the government's fiduciary duty and the tribe's aboriginal interests).

However, the Court finds the Tribe cannot assert a valid legal interest to the lands at issue in this case because those interests were abrogated by the 1889 Act.

First, Article 12 of the 1868 Fort Laramie Treaty does not apply to this action because there is no

present cession of or treaty concerning the lands at issue. These lands were removed from what remained of the Great Sioux Reservation, and were thus taken out of the control and interest of the tribes, once the 1889 Act went into effect. While the Tribe argues that the 1889 Act was not properly ratified, given the Sioux Commission's failure to garner the consent of three-fourths of the adult tribal males, it is undisputed that the United States government acted upon the supposed ratification by creating six reservations for the various tribes, including the Oglala Tribe's Pine Ridge Reservation, and returning the other land to the public domain. *Rosebud Sioux,* 430 U.S. at 589. In fact, the *Rosebud Sioux* Court noted that the "termination of Reservation status [contained in the 1889 Act] was agreed to by three-fourths of the adult male Indians on the Great Sioux Reservation, S.Ex.Doc. 51, 51st Cong., 1st Sess. 234, 242 (1890)." *Id.* at 589 n. 5.

While the constitutionality of the 1889 Act has not yet been litigated, the Supreme Court has previously found that "regardless of whether land [once held by Indians] is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control." *Bourland,* 508 U.S. at 692.

In this case, it is undisputed that the land at issue has been used, in part, as recreational areas for non-Indians for some time. *See* 2d Am. Compl. at

¶ 38. In addition, Congress authorized the transfer of land at issue by passing the WRDA, which does not even mention the 1868 Fort Laramie Treaty or any rights the Tribe might assert under it.[4] Given these facts, the Court cannot conclude that the Oglala Tribe has any legal interest that would allow it to presently seek declaratory and/or injunctive relief regarding those lands.

In dealing with prior transfers of land for flood control purposes, the Supreme Court found that in passing the FCA, "Congress gave the [Corps], not the [t]ribe[s], regulatory control over the *taken* area." *Bourland,* 508 U.S. at 691 (emphasis added). In addition, in assessing the rights of tribes to lands previously contained in the Great Sioux Reservation, the Court also found that Congress can act to change

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[4] In particular, § 605 of the WRDA specifically addresses the interests of Plaintiff in the Corps' transfer of land to the State of South Dakota, stating that "[a]ll permits, rights-of-way, and easements granted by the Secretary to the Oglala Sioux Tribe for land on the west side of the Missouri River between the Oahe Dam and Highway 14, and all permits, rights-of-way, and easements on any other land administered by the Secretary and used by the Oglala Sioux Rural Water Supply System, are granted to the Oglala Sioux Tribe in perpetuity to be held in trust under section 3(e) of the Mni Wiconi Project Act of 1988 (102 Stat. 2568)." Pub. L. No. 106-53, § 605(a)(1)(B). If the Secretary previously had the power to grant permits, rights-of-way, and easements to the Tribe for the land at issue, that is further acknowledgment that the Tribe did not possess that land prior to passage of the WRDA. *See* Black's Law Dictionary 527 (7th Ed. 1999) (defining easement, in part, as "the right to use" land "owned by another person").

tribal boundaries even though there was no evidence that the legislation had been ratified. *See Rosebud Sioux,* 430 U.S. at 615 (holding that even though there was no evidence that the 1904 Act had been ratified, the statutory language and legislative history showed that "[t]he intent of Congress in the 1904, 1907, and 1910 Acts was to change the boundaries of the original 1889 Rosebud Reservation").

In sum, in assessing what rights, if any, the Oglala Tribe may have under the 1868 Fort Laramie Treaty to the recreational areas and other lands at issue, the Court is mindful that

> in dealing with the validity of the cession of tribal lands enacted in contravention of a treaty requiring three-fourths Indian consent . . . "it was never doubted that the power to abrogate [the treaty] existed in Congress . . . [such that] the judiciary cannot question or inquire into the motives which promoted the enactment of [the cession] legislation." Although [the administrative commission] failed to garner the signature of three-quarters of the Indians in consent of the proposed changes, Congress understandably relied on this holding as authorizing it to diminish unilaterally the Reservation boundaries.

Rosebud Sioux, 430 U.S. at 594, *quoting Lone Wolf v. Hitchcock,* 187 U.S. 553, 556, 558 (1903).

In this case, regardless of whether the Crook Commission received the required authorization to

cede tribal lands under Article 12 of the 1868 Fort Laramie Treaty, and thus Section 28 of the 1889 Act, the United States government took action to diminish Reservation boundaries at that time and Congress passed many acts "to [further] change the boundaries of the original 1889 Rosebud Reservation." *Rosebud Sioux,* 430 U.S. at 615 (discussing Congress' passage of such acts in 1904, 1907, and 1910); *see also Sioux Nation,* 448 U.S. at 383 n. 14 (stating that "later congressional actions [had] the effect of further reducing the domain of the Great Sioux Reservation").

Thus, Congress, through the 1889 Act and other such legislation, authorized and acted upon the diminution of tribal lands previously held in the Great Sioux Reservation, including the lands at issue in this case. *See Sioux Nation,* 448 U.S. at 382 (stating that passage of the 1877 Act and subsequent transfer of the Black Hills portion of the Great Sioux Reservation "had the effect of *abrogating* the Fort Laramie Treaty") (emphasis added). Accordingly, the Court concludes that the Oglala Tribe does not have a valid legal interest in the recreational areas and other lands at issue because any interest was extinguished by the 1889 Act, once it became effective, and Congress' enactment of subsequent legislation.

Second, while the Tribe relies upon the *Haida Nation* case to support the assertion that Defendants owe the Tribe a trust responsibility based upon its aboriginal interest in the lands at issue, the facts of this case are not similar to those of *Haida Nation.* Specifically, the *Haida Nation* court rested its

findings, in part, on the fact that the tribe had never "surrendered their Aboriginal rights by treaty, and their Aboriginal rights ha[d] not been extinguished by federal legislation." 2002 BCCA 147 at ¶ 22 (internal quotations and citations omitted). In addition, the Canadian court concluded that "the fiduciary duty of the [government] to the aboriginal peoples [was grounded in] a general guiding principle for s. 35(1) of the Constitution Act, 1982," which states that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." *Id.* at ¶¶ 36-37.

In this case, the Court has already determined that the Oglala Tribe's rights to the land at issue had been extinguished by the 1889 Act, once it became effective, and other acts. *See* discussion, *supra*. Moreover, the United States Constitution does not contain a similar acknowledgment of aboriginal tribal rights. Thus, the Oglala Tribe cannot assert a valid aboriginal interest in the recreational and other lands at issue in this case, and Defendants cannot be found to have a trust responsibility over those lands. *See also Bourland,* 508 U.S. at 695 (finding "no evidence in the relevant treaties [including the 1868 Fort Laramie Treaty and the 1889 Act] or statutes [including the FCA] that Congress intended to allow the [t]ribe to assert regulatory jurisdiction over these lands pursuant to inherent sovereignty").

In sum, the Court concludes that the Oglala Sioux Tribe cannot establish standing to bring its first three claims because it cannot assert an injury

in fact to any valid interest in the recreational areas and other lands at issue in the case.[5]

B. Defendants Do Not Have Any Mandatory Obligations.

Section 106 of the NHPA requires

> [t]he head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State . . . shall, prior to the approval of the expenditure of any Federal funds on the undertaking . . . , take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.

16 U.S.C. § 470f. Section 110 of the NHPA was added in 1980 to "clarif[y] and codif[y] the minimum responsibilities expected of Federal agencies in carrying

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[5] Moreover, given that any injury to the Tribe occurred when the 1889 Act became effective and subsequent acts of Congress were enacted, and not by the transfer of land designated in Title VI of the WRDA, the second and third standing requirements cannot be met – any injury to the Tribe's interests is neither a result of the Corps' present WRDA actions nor redressable by ordering the Corps to stop the transfers. *See Lujan*, 504 U.S. at 560 (stating that to establish standing, there "must be a causal connection between the injury and the conduct complained of . . . [and] it must be likely . . . that the injury will be redressed by a favorable decision") (internal quotations omitted).

out the purposes of th[e] Act." *Lee v. Thornburgh*, 877 F.2d 1053, 1057 (D.C. Cir. 1989), (quoting H.R. Rep. No. 1457, 96th Cong., 2d Sess. 36 (1980)).

In this case, the Oglala Tribe claims that the NHPA requires the Corps "to locate, inventory and nominate for inclusion in the National Register . . . all Native American cultural items and other historic properties within the recreational areas and other lands [at issue in this case]." 2d Am. Compl. at ¶ F6. Defendants argue that Plaintiff's NHPA claim must be dismissed for lack of a statutory basis, contending that the NHPA creates essentially procedural obligations and thus does not mandate agency action.

In deciding whether mandamus is appropriate in this action, the Court is mindful that mandamus is a "drastic remedy, to be invoked only in extraordinary situations." *Consol. Edison Co. v. Ashcroft*, 286 F.3d 600, 605 (D.C. Cir. 2002). Accordingly, mandamus is available "only if: '(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff.'" *In re Medicare Reimbursement Litig.*, 309 F. Supp. 2d 89, 96 (D.D.C. 2004), (quoting *N. States Power Co. v. Dep't of Energy*, 128 F.3d 754, 758 (D.C. Cir. 1997)). In determining whether mandamus is available, an agency's duty must be "'so plainly prescribed as to be free from doubt and equivalent to a positive command. . . . [W]here the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the

character of judgment or discretion which cannot be controlled by mandamus.'" *Id.* (quoting *Wilbur v. United States,* 281 U.S. 206, 218-219 (1930)).

The Tribe argues that Section 110 creates a mandatory obligation for Defendants to "ensure that historic properties under the jurisdiction or control of the agency, *are* identified, evaluated, and nominated to the National Register." 16 U.S.C. § 470h-2(a)(2)(A) (emphasis added). However, a court in this District has already determined that "[t]he case law in this and other circuits holds that an agency's duty to act under the NHPA . . . is procedural in nature." *Nat'l Trust for Historic Pres. v. Blanck,* 938 F. Supp. 908, 925 (D.D.C. 1996), *aff'd* 203 F.3d 53 (D.C. Cir. 1999).

While Plaintiff tries to narrow the *Blanck* case to an examination only of Section 110(a)(2)(B), the *Blanck* court did not use such limiting language. In fact, after examining the statutory language and the relevant case law, the *Blanck* court concluded that "Section 110 *does not affirmatively mandate* the preservation of historic buildings or other resources" and only requires an agency "to comply to the fullest extent possible with, and in the spirit of, the Section 106 consultation process and with its own Historic Preservation Plan." 938 F. Supp. at 925 (emphasis added). Because the NHPA does not create a "plainly prescribed" duty to act on the part of the Corps, the

Court concludes that mandamus relief is inappropriate and Plaintiff's fourth claim is dismissed.[6]

IV. CONCLUSION

For the reasons stated above, this case is **dismissed** because (1) Plaintiff has failed to show that it has standing to bring its first three claims, and (2) mandamus is not the appropriate relief for its fourth claim. An appropriate Order will issue with this Memorandum Opinion.

/s/
Gladys Kessler
United States District Judge

March 15, 2008

Copies to: Attorneys of record via ECF

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[6] It should also be noted that Plaintiff acknowledges that the Corps has a "current section 110(a)(2) preservation program . . . [which includes] the recreational areas and other lands" at issue in this case, and notes that under that plan, the Corps has evaluated at least 25% of the possible historical sights on the lands at issue for inclusion on the Federal Register. Pl.'s Reply at 9 n. 2. Our Circuit Court has stated that NHPA Section 110 has "a limited reach . . . aimed solely at discouraging federal agencies from ignoring preservation values in projects they initiate, approve funds for or otherwise control." *Lee*, 877 F.2d at 1056. Thus, even if the Court were to conclude that mandamus was available under Section 110 of the NHPA, it appears that the Corps is not ignoring those duties because it has already planned for and acted upon its NHPA obligations in this case.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5133 **September Term, 2008**
Filed On: June 26, 2009

OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION,

APPELLANT

v.

UNITED STATES ARMY CORPS
OF ENGINEERS, ET AL.,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:01-cv-02679-GK)

Before: HENDERSON and TATEL, *Circuit Judges*, and
RANDOLPH, *Senior Circuit Judge*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED that the judgment of the District Court appealed from in this cause is

hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ _____
Michael C. McGrail
Deputy Clerk

MANDATE Pursuant to the provisions of Fed. R. App. Pro. 41(c)
ISSUED: 12/11/09
BY: /s/ [Illegible] , Deputy Clerk
ATTACHED: ___ Amending Order ___ Opinion ___ Order on Costs

Date: June 26, 2009

Opinion for the court filed by Senior Circuit Judge Randolph.

Opinion concurring in part, concurring in the judgment, and dissenting in part filed by Circuit Judge Tatel.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5133 **September Term 2009**

1:01-cv-02679-GK

Filed On: November 30, 2009

Oglala Sioux Tribe Of The
Pine Ridge Indian Reservation,

Appellant

v.

United States Army Corps
of Engineers, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges, and Randolph, Senior Circuit Judge

ORDER

Upon consideration of appellant's motion for leave to file to file [sic] a corrected petition for rehearing en banc with addendum and the lodged correction petition; and the absence of a request by any member of the court for a vote, it is

ORDERED that the motion for leave to file be granted. The Clerk is directed to file the lodged document. It is

FURTHER ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

TREATY WITH THE OGLALA SIOUX, July 5, 1825, Arts. 2 and 3 7 Stat. 253

ARTICLE 2.

The United States agree to receive the Sioune and Ogallala bands of Sioux into their friendship, and under their protection, and to extend to them, from time to time, such benefits and acts of kindness as may be convenient, and seem just and proper to the President of the United States.

ARTICLE 3.

All trade and intercourse with the Sioune and Ogallala bands shall be transacted at such place or places as may be designated and pointed out by the President of the United States, through his agents; and none but American citizens, duly authorized by the United States, shall be admitted to trade or hold intercourse with said bands of Indians.

FT. LARAMIE TREATY OF SEPTEMBER 17, 1851, Art. 5 11 Stat. 749

ARTICLE 5.

The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz:

The territory of the Sioux or Dahcotah Nation, commencing the mouth of the White Earth River, on the Missouri River: thence in a southwesterly direction to the forks of the Platte River: thence up the north fork of the Platte River to a point known as the Red Bute, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.

The territory of the Gros Ventre, Mandans, and Arrickaras Nations, commencing at the mouth of Heart River; thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of Powder River in a southeasterly direction, to the head-waters of the Little Missouri River; thence along the Black Hills to the head of Heart River, and thence down Heart River to the place of beginning.

The territory of the Assinaboin Nation, commencing at the mouth of Yellowstone River; thence up the Missouri River to the mouth of the Muscle-shell

River; thence from the mouth of the Muscle-shell River in a southeasterly direction until it strikes the head-waters of Big Dry Creek; thence down that creek to where it empties into the Yellowstone River, nearly opposite the mouth of Powder River, and thence down the Yellowstone River to the place of beginning.

The territory of the Blackfoot Nation, commencing at the mouth of Muscle-shell River; thence up the Missouri River to its source; thence along the main range of the Rocky Mountains, in a southerly direction, to the head-waters of the northern source of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence across to the head-waters of the Muscle-shell River, and thence down the Muscle-shell River to the place of beginning.

The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth.

The territory of the Cheyennes and Arrapahoes, commencing at the Red Bute, or the place where the road leaves the north fork of the Platte River; thence up

the north fork of the Platte River to its source; thence along the main range of the Rocky Mountains to the head-waters of the Arkansas River; thence down the Arkansas River to the crossing of the Santa Fé road; thence in a northwesterly direction to the forks of the Platte River, and thence up the Platte River to the place of beginning.

It is, however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.

FT. LARAMIE TREATY OF APRIL 29, 1868, Arts. 2 and 12 15 Stat. 635

ARTICLE 2.

The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employés of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said

Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

ARTICLE 12.

No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in article 6 of this treaty.

ACT OF MARCH 2, 1889, ch. 405, § 28 25 Stat. 888, 899

SEC. 28

That this act shall take effect, only, upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in manner and form prescribed by the twelfth article of the treaty between the United States and said Sioux Indians concluded April twenty-ninth, eighteen hundred and sixty-eigth [sic], which said acceptance and consent, shall be made known by proclamation by the President of the United States, upon satisfactory proof presented to him, that the same has been obtained in the manner and form required, by said twelfth article of said treaty; which proof shall be presented to him within one year from the passage of this act; and upon failure of such proof and proclamation this act becomes of no effect and null and void.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION, Plaintiff, v. THE UNITED STATES ARMY CORPS OF ENGINEERS; LES BROWNLEE, Acting Secretary of the Army; DOMONIC IZZO, Principal Deputy Assistant Secretary of the Army for Civil Works; ROBERT B. FLOWERS, Chief of Engineers; KURT F. UBBELOHDE, Omaha District Commander and District Engineer, Department of the Army, Corps of Engineers, Omaha District; and THE UNITED STATES OF AMERICA, Defendants.	Case No. 1:01CV02679 (GK) Judge Gladys Kessler SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND RELIEF IN THE NATURE OF MANDAMUS (Filed Sep. 15, 2003)

A. INTRODUCTION.

1. This is an action for declaratory and injunctive relief and relief in the nature of mandamus brought against the United States of America and

certain of its agencies, officials and employees. It arises over the transfer and intended transfer by the United States to the State of South Dakota of certain recreation areas and other lands managed by the Army Corps of Engineers along the Missouri River in South Dakota, which lands are the aboriginal homeland of the Oglala Sioux people and the other peoples of the Sioux Nation, and in which the Oglala Sioux people continue to own legally-protected interests.

B. PARTIES.

2. Plaintiff OGLALA SIOUX TRIBE is a body politic comprised of approximately 41,000 citizens with territory of over 4,700 square miles in the southwestern portion of South Dakota. The Oglala Sioux Tribe is the freely and democratically-elected government of the Oglala Sioux people, with a governing body duly recognized by the Secretary of Interior. The Oglala Sioux Tribe is the successor-in-interest to the Oglala Band of the Teton Division of the Sioux Nation, and is a protectorate nation of Defendant THE UNITED STATES OF AMERICA. The Oglala Band reorganized in 1936 as the "Oglala Sioux Tribe of the Pine Ridge Indian Reservation" ("Oglala Sioux Tribe" or "Tribe") under section 16 of the Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 476, and enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b. Its address is P.O. Box 2070, Pine Ridge, South Dakota 57770-2070.

3. Defendant ARMY CORPS OF ENGINEERS ("Army Corps" or "Corps") is an executive agency of the United States and a branch of the United States Department of the Army. Its address is 441 G. Street NW, Washington, D.C. 20314.

4. Defendant LES BROWNLEE is the duly appointed and acting Secretary of the Army. His address is the Pentagon, Washington, D.C. 20310. He is being sued in his official capacity.

5. Defendant DOMINIC IZZO is the duly appointed and acting Principal Deputy Assistant Secretary of the Army in charge of Civil Works. His address is 108 Army-Pentagon, Washington, D.C. 20310-0108. He is being sued in his official capacity.

6. Defendant ROBERT B. FLOWERS is the Chief of Engineers of the Army Corps. His address is 441 G Street NW, Washington, D.C. 20314. He is being sued in his official capacity.

7. Defendant KURT F. UBBELOHDE is the Omaha District Commander and District Engineer in charge of civil works. His address is Department of the Army, Corps of Engineers, Omaha District, 106 South 15th Street, Omaha, Nebraska 68102-1618. He is being sued in his official capacity.

8. Defendant THE UNITED STATES OF AMERICA is a body politic existing pursuant to the Constitution of the United States of America.

C. JURISDICTION.

9. This action arises under the Constitution and laws of the United States, including U.S. Const. Art. 6 (Supremacy Clause) and Amend. 5 (Due Process and Takings Clauses); the Treaty of July 2, 1825, United States-Oglala Band of Sioux Nation, 7 Stat. 252; Rev. Stat. § 2116, 25 U.S.C. § 177 (*codifying* section 12 of the Trade and Intercourse Act of June 30, 1834, ch. 161, 4 Stat. 730); the Treaty of September 17, 1851, United States-Teton Division of Sioux Nation, *et al.*, 11 Stat. 749; the Treaty of April 29, 1868, United States-Sioux Nation, 15 Stat. 635; Rev. Stat. § 2079, 25 U.S.C. § 71 (*codifying* the Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566); the Act of March 2, 1889, ch. 405, 25 Stat. 888; the Act of June 18, 1934, ch. 576, 48 Stat. 987, *as amended*, 25 U.S.C. § 461 *et seq.*; the Water Resources Development Act of August 17, 1999, P. L. 106-53, Title VI, §§ 601-609, 113 Stat. 269, 385, *as amended by* the Water Resources Development Act of December 11, 2000, P. L. 106-541, Title V, § 540, 114 Stat. 2572, 2664; the National Historic Preservation Act of October 15, 1966, P.L. 89-665, 80 Stat. 915, *as amended*, 16 U.S.C. § 470 *et seq.*; the Native American Graves Protection and Repatriation Act of November 16, 1990, P.L. 101-601, 104 Stat. 3048, *as amended*, 25 U.S.C. § 3001 *et seq.*; and other federal statutory and common law.

10. Jurisdiction over this action is conferred on this Court by 28 U.S.C. § 1331(a), as this is a civil action arising under the Constitution, laws and treaties of the United States; 28 U.S.C. § 1361, as this is

an action in the nature of mandamus to compel an officer or employee of the United States or an agency thereof to perform a duty owed to Plaintiff; and 28 U.S.C. § 1362, as this is a civil action brought by an Indian tribe with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws and treaties of the United States.

11. Venue is proper in this Court in accordance with 28 U.S.C. § 1391(b)(2) and (e)(1) and (2), as a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District and one or more Defendants in this action reside in this District.

D. STATEMENT OF FACTS.

12. The Sioux Nation is comprised of seven divisions: (1) Medawakanton; (2) Sisseton; (3) Wahpakoota; (4) Wahpeton; (5) Yankton; (6) Yantonai; and (7) Teton. *Sioux Nation v. United States*, 24 Ind. Cl. Comm. 147, 162 (1970).

13. The Teton Division is comprised of seven distinct, sovereign bands: (1) Blackfeet; (2) Brule; (3) Hunkpapa; (4) Minneconjou; (5) No Bows; (6) Oglala; and (7) Two Kettle. The members of these bands currently reside generally on the following reservations in South Dakota:

TETON BAND	RESERVATION
Blackfeet	Cheyenne River Reservation
Brule	Rosebud Reservation and Lower Brule Reservation
Hunkpapa	Standing Rock Reservation
Minneconjou	Cheyenne River Reservation
No Bows	Cheyenne River Reservation
Oglala	Pine Ridge Reservation
Two Kettle	Cheyenne River Reservation

14. Since time immemorial and up to and through the time of some of the actions which form the basis of this Complaint, the seven Teton bands, jointly and severally, have exclusively used and occupied the following described territory in the Missouri River basin, delineated on the map attached hereto as Exhibit "A" and incorporated herein:

(a) West of the Missouri River, approximately sixty million acres of land in what are now the States of North Dakota, South Dakota, Nebraska, Montana and Wyoming; and

(b) East of the Missouri River, approximately fourteen million acres of land in what are now the States of North Dakota and South Dakota.

15. At least as early as the Tenth Century, members of the seven Teton bands maintained intimate ties of kinship, religion, ceremony, and trade with the

agricultural tribal peoples that occupied large earth-lodge villages within the Missouri River trench, i.e., the Arikara, Hidatsa, and Mandan peoples. The Teton people and the village peoples gathered seasonally at their Missouri River trench villages to trade and to conduct shared ceremonies. While camped together, they intermarried, had children and buried their dead together. The Teton bands supplied these village peoples with meat, hides and furs from hunting and trapping, and other commodities acquired through other long-distance trade relations, such as copper from the Great Lakes region and obsidian from the Yellowstone region. In exchange the village peoples supplied the Teton bands with maize, beans, and other farm products.

16. These relationships continued until the Arikara, Hidatsa and Mandan were removed from their territories by the United States in the early Nineteenth Century.

17. The United States and the Oglala Band entered into a treaty of friendship and protection on July 5, 1825, 7 Stat. 252, which treaty was duly ratified by the United States and proclaimed on February 6, 1826. By Article 2 of the 1825 Treaty, the United States brought the Oglala Band and its members under its protection and the Oglala Band became a protectorate nation of the United States.

18. By Article 3 of the 1825 Treaty, Congress extended the Trade and Intercourse Acts to the Oglala Band and its aboriginal territory, including

permanent successor provisions of section 12 of the Act of June 30, 1834, ch. 161, 4 Stat. 730, *currently codified at* Rev. Stat. § 2216, 25 U.S.C. § 177, which provides that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

19. The United States and the seven bands of the Teton Division of the Sioux Nation, and others, entered into a treaty on September 17, 1851, 11 Stat. 749 ("1851 Fort Laramie Treaty" or "1851 Treaty"), which treaty was duly ratified by the United States. Article 5 of the 1851 Fort Laramie Treaty defined the territory of the bands of the Teton Division as follows ("1851 Treaty territory"):

> commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Butte, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of the Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.

20. In *Sioux Tribe v. United States*, 15 Ind. Cl. Comm. 577 (1965), the Indian Claims Commission ruled that the 1851 Treaty was a multi-lateral treaty

by which the United States recognized the aboriginal territory of not only the seven Teton bands, but also the aboriginal territories of the other signatory tribes, including the Hidatsa, also known as the Gros-Ventre, the Mandan and the Arikara tribes. The Commission ruled that article 5 of the 1851 Treaty recognized the seven Teton bands' joint and several aboriginal Indian title to the entire sixty million acre area west of the Missouri River referred to in paragraph 14(a), above.

21. In *Sioux Nation v. United States*, 23 Ind. Cl. Comm. 419, 424 (1970), the Commission further determined that the seven Teton bands also held aboriginal Indian title to the entire fourteen million acre area east of the Missouri River referred to in paragraph 14(b), above.

22. Unconsented encroachments on the 1851 Treaty territory by the United States and its citizens resulted in the Powder River War of 1866-1868 between the United States and the Teton bands. Peace was concluded between the United States and the Teton bands by treaty on April 29, 1868, 15 Stat. 635 ("1868 Fort Laramie Treaty" or "1868 Treaty"), which treaty was duly ratified by the United States on February 16, 1869 and proclaimed on February 24, 1869. The 1868 Treaty provided for a mutual demobilization without terms of surrender on either side.

23. Article 2 of the 1868 Treaty established a designated territory within the 1851 Treaty territory boundaries for the seven Teton bands and other Sioux

bands. This territory is commonly referred to as the "Great Sioux Reservation," and is described in article 2 of the 1868 Treaty as follows:

> Commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of the beginning; and in addition thereto, all existing reservations on the east bank of the said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named. . . .

This territory is delineated on the map attached hereto as Exhibit "B" and incorporated herein. Article 2 of the 1868 Treaty again recognized the seven Teton bands' aboriginal Indian title to all the lands within the Great Sioux Reservation, which included all lands west of the low water mark of the east bank of the Missouri River, and again vested that title under the Constitution and laws of the United States.

24. Article 12 of the 1868 Treaty further provided that no future cessions of territory within the Great Sioux Reservation would be of "any validity or

force . . . unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same. . . ." Under article 12, the United States and Teton bands agreed to limit their sovereign powers to cede and to accept cessions of land for the protection and peace of both parties.

25. By the Act of February 28, 1877, ch. 72, 19 Stat. 254 ("1877 Act"), Congress purported to ratify and confirm an agreement between commissioners on behalf of the United States and the Teton and other bands of the Sioux Nation and the Northern Cheyenne and Arapaho tribes. The purported agreement provided for the cession of over 7 million acres of territory in the western part of the Great Sioux Reservation, including the Black Hills. No such agreement existed in fact or in law. The territory purportedly agreed to be ceded is delineated in the map attached hereto as Exhibit "B." None of these lands are the subject of this action.

26. In *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), the Supreme Court held that the 1877 Act amounted to confiscation by the United States of the western end of Great Sioux Reservation, and that such confiscation violated both Article 12 of the 1868 Treaty and the Fifth Amendment to the Constitution.

27. By the Act of March 2, 1889, ch. 405, 25 Stat. 888 ("1889 Act"), Congress conditionally provided for the creation of six smaller reservations within the balance of the Great Sioux Reservation,

the release of title by Indian persons associated with each smaller reservation to each of the other five smaller reservations, and for the restoration to the public domain and opening to settlement of the balance of territory within the Great Sioux Reservation outside the boundaries of those six smaller reservations. These six smaller reservations are called the Pine Ridge Indian Reservation, the Rosebud Indian Reservation, the Standing Rock Indian Reservation, the Cheyenne River Indian Reservation, the Lower Brule Indian Reservation and the Crow Creek Indian Reservation, and are delineated on the map attached hereto as Exhibit "C" and incorporated herein. The effectiveness of the 1889 Act was expressly conditioned upon the acceptance of and consent to its provisions in the manner required by article 12 of the 1868 Fort Laramie Treaty, i.e., its execution and signature by three-fourths of the adult male members of the bands and tribes signatory to the 1868 Treaty. Sections 16, 21 and 28 of the 1889 Act provided in part:

> Sec. 16. That the acceptance of this act by the Indians in the manner and form as required by the said treaty concluded between the different bands of the Sioux Nation of Indians and the United States, April twenty-ninth, eighteen hundred and sixty-eight . . . , as hereinafter provided, shall be taken and held to be a release of all title on the part of the Indians receiving rations and annuities on each of the said separate reservations, to the lands described in each of the other reservations so created, and shall be taken

and held to confirm in the Indians entitled to receive rations at each of said separate reservations, respectively, to their separate and exclusive use and benefit, all the title and interest of every name and nature secured therein to the different bands of the Sioux Nation by said treaty of April twenty-ninth, eighteen hundred and sixty eight.

Sec. 21. That all the lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public domain, . . . and shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law. . . . and under the law relating to town-sites: *Provided*, . . . That all lands herein opened to settlement under this act remaining undisposed of at the end of ten years from the taking effect of this act shall be taken and accepted by the United States and paid for by said United States at fifty cents per acre, which amount shall be added to and credited to said Indians as part of their permanent fund, and said lands thereafter shall be part of the public domain of the United States, to be disposed of under the homestead laws of the United States, and the provisions of this act. . . .

Sec. 28. That this act shall take effect, only, upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in manner and form prescribed by the twelfth article of the treaty between the United States and said Sioux

> Indians, concluded April twenty-ninth, eighteen hundred and sixty-eight, which said acceptance and consent, shall be made known by proclamation by the President of the United States, upon satisfactory proof presented to him, that the same has been obtained in the manner and form required by said twelfth article of said treaty; which proof shall be presented to him within one year from the passage of this act; and upon failure of such proof and proclamation this act becomes of no effect and null and void.

28. A three-member commission appointed by the Secretary of the Interior (the "Crook Commission") was charged with obtaining the consent of three-fourths of the adult male members of the bands and tribes signatory to the 1868 Treaty for the 1889 Act to take effect in accordance with section 28 of the 1889 Act. The Crook Commission determined that it would seek to have the adult male members associated with each of the six agencies of the Interior Department within the Great Sioux Reservation ("Sioux agencies") sign a quit claim deed in order to evidence their consent under article 12 of the 1868 Treaty in accordance with section 28 of the 1889 Act. The Commission scheduled meetings during the summer of 1889 at the six Sioux agencies to obtain the requisite number of signatures on quit claim deeds.

29. The Crook Commission failed to obtain the consent of three-fourths of the adult male members of the bands and tribes signatory to the 1868 Treaty.

Five thousand six hundred seventy-eight (5,678) adult male members were eligible to give consent under article 12 of the 1868 Treaty and section 28 of the 1889 Act. Three-fourths of that number equals 4,259. The Crook Commission obtained no more than 3,942 valid signatures on quit claim deeds. The Commission obtained 4,463 signatures on quit claim deeds, but at least 521 of those signatures were invalid. At least 185 signatures obtained by the Commission were from non-Indian persons, at least 183 signatures were from Indian persons of mixed blood (who were disqualified from signing by section 7 of the Act of February 28, 1877, ch. 72, 19 Stat. 254), at least 104 signatures were from Indian persons not members of the bands and tribes signatory to the 1868 Treaty, at least 43 signatures were from underage (non-adult) Indian persons, at least 3 signatures were from Indian persons who were female, and at least 3 signatures were duplicates.

30. The majority of the signatures obtained by the Crook Commission were obtained through coercion, fraud and bribery, including but not limited to the following means:

(a) False imprisonment, by keeping adult male Indian persons at the Sioux agencies and preventing them from returning to their homes until they signed quit claim deeds;

(b) Threats and intimidation, including but not limited to threatening adult male Indian persons: (i) that Congress would unilaterally take their reservation lands if they did not

sign; (ii) that their subsistence rations would be cut if they did not sign; and, (iii) that the U.S. military would be brought into deal with them if they did not sign.

(c) Fraud, by getting adult male Indian persons drunk to secure their signatures;

(d) Fraud, by failing to inform adult male Indian persons that their signatures were being sought in order to approve the cession of approximately nine million acres of territory within the Great Sioux Reservation to the United States; and

(e) Bribery, including but not limited to, offering money, personal favors and issuing beef and other rations to certain individuals to secure signatures.

31. On or about January 30, 1890, the Crook Commission submitted a report concerning its activities to President Benjamin Harrison entitled *Report and Proceedings of the Sioux Commission*, Sen. Exec. Doc. 51, 51st Cong., 1st Sess. (1890) ("1890 Commission Report"). Among other things, the 1890 Commission Report contained the name of each of the persons from whom the Commission had obtained signatures on quit claim deeds. The census records contained in the 1890 Commission Report show *prima facie* that the Commission failed to obtain signatures from three-fourths of the adult male members eligible to give consent under article 12 of the 1868 Treaty and section 28 of the 1889 Act.

32. On February 10, 1890, President Harrison issued a Proclamation, 26 Stat. 1554 ("1890 Proclamation"), declaring the 1889 Act to be in effect. The Proclamation stated in part:

> I, Benjamin Harrison, President of the United States, by virtue of the powers in me vested, do hereby make known and proclaim the acceptance of said act by the different bands of the Sioux Nation of Indians, and the consent thereto by them as required by the act, and said act is hereby declared to be in full force and effect, subject to all the provisions, conditions, limitations and restrictions, contained therein. . . . All persons will take notice of the provisions of said act, and of the conditions, limitations and restrictions therein contained, and be governed accordingly.

33. President Harrison's action issuing the 1890 Proclamation was *ultra vires* and contrary to law and in violation of the constitutional rights of the members of the Oglala Band.

34. Congress did not clearly and unequivocally express any intention by the 1889 Act to diminish or otherwise alter the boundaries of the Great Sioux Reservation. The 1889 Act contains no language of diminishment or alteration of the boundaries of the Great Sioux Reservation, and no language of cession of any territory or relinquishment or extinguishment of title to any lands of the Great Sioux Reservation,

save release of title by members of one reservation to the other five smaller reservations.

35. Since 1890 up to and including the present, the Oglala Band and its successor, the Oglala Sioux Tribe, has protested the facts alleged above continuously, publicly and notoriously; has continuously, publicly and notoriously maintained that the boundaries of the Great Sioux Reservation were never diminished or otherwise altered by the 1889 Act; has continuously, publicly and notoriously maintained that it retains recognized aboriginal Indian title to all lands located therein; and has never acquiesced in any claim or assertion that said boundaries have been diminished or otherwise altered or that such title has been relinquished or extinguished.

36. Since 1890 up to and including the present, the United States has disregarded the said protestations by the Oglala Band and the Oglala Sioux Tribe in that, *inter alia*, the United States has denied the Band, the Tribe and its members, by force and threat of criminal prosecution, their right to use and occupy any lands, except lands within the Pine Ridge Reservation, within the balance of the Great Sioux Reservation, including all lands within the other five of the six smaller reservations conditionally created in sections 2-6 of the 1889 Act and nine million acres of lands conditionally "restored" to the public domain and opened to settlement in section 21 of the 1889 Act.

37. By the Flood Control Act of December 22, 1944, P.L. 534, ch. 665, 58 Stat. 887, Congress authorized the Missouri River Pick-Sloan Program ("Pick-Sloan Program" or "Program") and charged the Army Corps of Engineers with constructing six dam and reservoir projects on the main stem of the Missouri River under the Program. Thereafter, the Corps acquired approximately two million acres of land ("Pick-Sloan Project Lands") for the six dam and reservoir projects and constructed the projects. Four of the dams and reservoirs are located in South Dakota, within the Great Sioux Reservation: Oahe Dam and Lake Oahe, Big Bend Dam and Lake Sharpe, Fort Randall Dam and Lake Francis Case, and Lewis and Clark Dam and Lewis and Clark Lake ("South Dakota Pick-Sloan Projects"). In the case of Oahe Dam and Lake Oahe, the Corps acquired some land under an agreement between the United States and the Cheyenne River Sioux Tribe enacted by the Act of September 3, 1954, P.L. 776, 68 Stat. 1191 ("1954 Agreement"). In the case of the balance of the land around Oahe Dam and Lake Oahe and the other three dams and lakes of the South Dakota Pick-Sloan Projects, the Corps acquired land by condemnation or by mesne conveyances. The Oglala Sioux Tribe was not a party to the 1954 Agreement. Neither did the Corps join the Oglala Sioux Tribe as a party to any condemnation proceeding relating to, nor was the Oglala Sioux Tribe party to any mesne conveyance of, Pick-Sloan Project Lands within the Great Sioux Reservation.

38. The Corps subsequently constructed and has operated and maintained approximately 112 shoreline recreational areas in South Dakota around the shores of Lake Oahe, Lake Sharpe, Lake Francis Case and Lewis and Clark Lake. Of these 112 recreational areas, approximately 105 are located within the aboriginal territory of the Oglala Band.

39. By the Water Resources Development Act of August 17, 1999, P. L. 106-53, Title VI, §§ 601-609, 113 Stat. 269, 385, *as amended by* the Water Resources Development Act of December 11, 2000, P. L. 106-541, Title V, § 540, 114 Stat. 2572, 2664 ("WRDA"), Congress directed the Secretary of the Army to transfer title or grant perpetual leases to recreational areas and other lands around Lake Oahe, Lake Sharpe, Lake Francis Case and Lewis and Clark Lake to the State of South Dakota, the Cheyenne River Sioux Tribe and the Lower Brule Sioux Tribe on or before January 1, 2002. WRDA was enacted by Congress without public hearings and over the objections of the Oglala Sioux Tribe.

40. By section 605, subsections (a)(1)(A), (b) and (c) of the WRDA, Congress directed the Secretary of the Army to convey to the State of South Dakota by transfer or lease 91,178 acres of lands around the four reservoirs, including 73 recreational areas: 30 areas by transfer and 4 areas by lease around Lake Oahe, 8 areas by transfer around Lake Sharpe, 21 areas by transfer and 3 areas by lease around Lake Francis Case, and 6 areas by transfer and 1 area by lease around Lewis and Clarke Lake. Fifty-one

recreational areas and other lands around Lake Oahe, Lake Sharpe and Lake Francis Case are located within Oglala aboriginal territory. Eighteen of such areas and other lands are located west of the Missouri River within the Great Sioux Reservation and 33 of such areas and other lands are located outside that reservation but within the fourteen million acre area east of the Missouri River referred to in paragraph 14(b), above. All of these recreational areas and other lands are the subject of this action.

41. The 7 recreational areas and other lands around Lewis and Clark Lake and 12 recreational areas and other lands on the east bank of Lake Francis Case were one time part of the aboriginal territory of the Oglala Band, but the Oglala Band and other bands of the Teton Division of the Sioux Nation voluntarily relinquished their right of exclusive use and occupancy of the area to the Yankton Division of the Sioux Nation more than a century prior to the 1825 Treaty, and are subject to the stewardship of the Yankton Sioux Tribe and are not the subject of this action.

42. By section 606, subsections (b) and (c) of the WRDA, Congress directed the Secretary of the Army to convey by transfer 6 recreational areas and other lands around Lake Oahe to the Cheyenne River Sioux Tribe, and 6 recreational areas and other lands by transfer and 3 recreational areas by lease around Lake Sharpe, and other lands around Lake Francis Case, to the Lower Brule Sioux Tribe. These recreational areas and other lands are part of the aboriginal

territory of the Oglala Band, but are within the Cheyenne River Indian Reservation, the Lower Brule Indian Reservation or the Crow Creek Indian Reservation, and are subject to the stewardship of the Cheyenne River Sioux Tribe and the Lower Brule Sioux Tribe and are not the subject of this action.

43. By section 3 of the Native American Graves Protection and Repatriation Act of November 16, 1990, P.L. 101-601, 104 Stat. 3048, 25 U.S.C. § 3002(a) ("NAGPRA"), Congress declared ownership or control of Native American human remains, associated and unassociated funerary objects, sacred objects and items of cultural patrimony ("Native American cultural items") excavated or discovered on federal or tribal lands after November 16, 1990 to be vested either in lineal descendants of the deceased or Indian tribes under a priority formula. Under this formula, except in the case of human remains and associated funerary objects where the lineal descendants of the deceased can be ascertained, ownership and control of Native American cultural items is vested in the Indian tribe which, upon notice, states a claims [sic] for such items and: 1) is the Indian tribe on whose tribal land such items were discovered, or if there is none, 2) is the Indian tribe with the closest cultural affiliation with such items, or if that cannot reasonably be ascertained, 3) is an Indian tribe able to prove a stronger cultural relationship to such items than the Indian tribe recognized as aboriginally occupying the area in which the objects were discovered by a final judgment of the Indian Claims Commission

or Court of Federal Claims, or if such stronger relationship cannot be proven, 4) is the Indian tribe so recognized as aboriginally occupying the area.

44. On or about December 4, 2001, the Oglala Sioux Tribe notified the Army Corps pursuant to NAGPRA that it claims ownership and control of all Native American cultural items excavated or discovered, *inter alia*, at all of the recreational areas or other lands that are the subject of this action, including, but not limited to, those Native American cultural items classified by the Army Corps as "Teton," "Sioux" or "Arikara."

45. By the National Historic Preservation Act of October 15, 1966, P.L. 89-665, 80 Stat. 915, *as amended*, 16 U.S.C. § 470 *et seq.* ("NHPA"), Congress provided for the establishment of the National Register of Historic Places ("National Register") and provided enforceable legal protection for all historic properties included in the National Register or eligible for inclusion. By section 110 of the NHPA, 16 U.S.C. § 470h-2(a)(2), each federal agency is required to establish a program for the identification, evaluation and nomination to the National Register of all historic properties, including all properties eligible for inclusion in the National Register; under the jurisdiction and control of such federal agency, and to ensure that such properties are identified, evaluated and nominated.

46. By section 605(h) of the WRDA, Congress provided that the NHPA shall continue to apply after

transfer or lease to all lands to be transferred or leased to the State of South Dakota under section 605, the same as if the lands continued to be managed by the Army Corps. By section 607(a)(6)(A) of the WRDA, Congress provided that the authority of the Army Corps to enforce the provisions of the NHPA with respect to all lands to be transferred or leased to the State of South Dakota under section 605 would not be diminished as a result of such transfer or lease.

47. The recreational areas and other lands that are the subject of this action contain Native American cultural items and historic properties included or eligible to be included in the National Register, including human remains, associated and unassociated funerary objects, grave goods, sacred places and other items of cultural patrimony, prehistoric and historic village sites, ceremonial sites, structures, objects, artifacts, records and remains, and other properties, each of which is of traditional religious, cultural and historical importance to the Oglala Sioux Tribe and its members. At least four of these properties are included in the National Register, and at least five of these properties have been determined by the Army Corps to be eligible for inclusion in the National Register but have not been nominated, including, but not limited to:

(a) Walth Bay Village within the Walth Bay Recreation Area, a well-known and well-documented earth-lodge village;

(b) Sewer Bay Plains Village within the Indian Creek Recreation Area, which contained human remains and was probably part of the now-inundated Larson Village;

(c) An early Archaic occupation near the Indian Creek Recreation Area boat ramp, which is has [sic] been recommended to be listed in the National Register;

(d) A Woodland-era village site within the North Point Recreation Area, which has been explored but never thoroughly studied; and

(e) A largely unexcavated village within the Spring-Cow Creek Recreation Area.

At least 43 other of these properties have been identified by the Army Corps as potentially eligible for inclusion in the National Register but have never been evaluated by the Army Corps or nominated for inclusion. In addition, at least five other of these properties have been identified by the South Dakota State Historic Preservation Officer ("SHPO") as potentially eligible for inclusion in the National Register but have never been evaluated by the Army Corps or nominated for inclusion. These five other properties have been specifically characterized by the South Dakota SHPO as being "Sioux" or "Siouan." The Army Corps has failed to perform any field assessment of these properties.

48. Defendants have failed to conduct field surveys to ascertain the current condition of known historic properties included or eligible for inclusion in

the National Register within the recreational areas and other lands that are the subject of this action. For example, as early as the period 1979-1983, the Army Corps was notified by its contract archaeologists that cultural resources were being damaged and removed by recreational users. The Army Corps has taken no adequate or effective measures to protect these properties. Many of the religious, cultural, and historical resources described in paragraph 47, above, were damaged or removed during the time they have been managed by the Army Corps, without the knowledge or consent of the Oglala Sioux Tribe. For example, the Walth Bay Village was reported in 1986 to be subject to continuing vandalism and disturbance from recreational visitors, and the village site within the Spring-Cow Creek Recreation Area was already deteriorating in 1979 from erosion and recreational use.

49. On February 8, 2002, Plaintiff duly filed Notices of Lis Pendens in accordance with Rule 64 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1964 and the laws of the State of South Dakota, giving constructive notice of this action with respect to, *inter alia*, each of the recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation. On the same date, Plaintiff duly filed Notices of Lis Pendens in accordance with Rule 64, 28 U.S.C. § 1964 and the laws of the State of South Dakota, giving constructive notice of this action with respect to, *inter alia*, each of the recreational areas and other lands

that are the subject of this action within the fourteen million acre area east of the Missouri River referred to in paragraph 14(b), above, with the following exceptions: a Notice of Lis Pendens was duly presented for filing on said date to the Register of Deeds in Walworth County, South Dakota, within which 8 recreational areas and other lands that are the subject of this action are located, but the Register of Deeds wrongfully failed and refused to file such notice; and no Notice of Lis Pendens was filed in Campbell County, South Dakota, within which 6 recreational areas and other lands that are the subject of this action are located.

50. On or about February 8, 2002, Defendants purported to transfer or lease to the State of South Dakota some but not all of the recreational areas and other lands that are the subject of this action, some but not all of which are within the boundaries of the Great Sioux Reservation. On information and belief, at some future date Defendants intend to transfer or lease to the State of South Dakota the balance of the recreational areas and other lands that are the subject of this action.

E. CLAIMS FOR RELIEF.

FIRST CLAIM FOR RELIEF

51. Plaintiff realleges the allegations contained in paragraphs 1-50, above.

52. The 1889 Act never became effective in accordance with section 28 of the said Act.

53. The 1889 Act did not operate to diminish or otherwise alter the boundaries of the Great Sioux Reservation.

54. No treaty or act of Congress subsequent to March 2, 1889 has ever diminished or otherwise altered the boundaries of the Great Sioux Reservation.

55. Defendants deny and continue to deny that the boundaries of the Great Sioux Reservation have never been diminished or otherwise altered by the 1889 Act or other subsequent treaty or act of Congress, and have failed and refused and continue to fail and refuse to acknowledge and abide by the legal relationship between the Oglala Sioux Tribe and Defendants established by the 1868 Fort Laramie Treaty with respect to the recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation.

56. Plaintiff has suffered injury in fact to its legally-protected interests in the recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation as a direct result of Defendants aforesaid actions, failures and refusals, and is likely to continue to suffer such injury, unless declaratory relief is granted by this Court.

SECOND CLAIM FOR RELIEF

57. Plaintiff realleges the allegations contained in paragraphs 1-56, above.

58. The recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation are subject to the provisions of article 12 of the 1868 Fort Laramie Treaty.

59. Article 12 of the 1868 Fort Laramie Treaty prohibits Defendants from transferring or leasing to the State of South Dakota pursuant to section 605 of the WRDA the recreational areas or other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation without the voluntary consent in accordance with article 12 of the 1868 Fort Laramie Treaty of each of the bands of the Sioux Nation signatory to the 1868 Fort Laramie Treaty, or their successors.

60. None of the bands of the Sioux Nation signatory to the 1868 Fort Laramie Treaty, or their successors, including the Oglala Sioux Tribe, have given their voluntary consent in accordance with article 12 of the 1868 Fort Laramie Treaty to the transfer or lease to the State of South Dakota pursuant to section 605 of the WRDA of the recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation.

61. On or about February 8, 2002, Defendants purported to transfer or lease to the State of South Dakota certain recreational areas and other lands that are the subject of this action, and are likely to transfer or lease to the State of South Dakota the balance of the recreation areas and other lands that are the subject of this action, and within the boundaries of the Great Sioux Reservation, unless declaratory and injunctive relief is granted by this Court.

62. Plaintiff has suffered injury in fact to its legally-protected interests in the recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation as a direct result of the aforesaid actions of Defendants, and is likely to continue to suffer such injury, and is likely to suffer further such injury as a direct result of the aforesaid likely further actions of Defendants, unless declaratory and injunctive relief is granted by this Court.

THIRD CLAIM FOR RELIEF

63. Plaintiff realleges the allegations contained in paragraphs 1-62, above.

64. Defendants owe a trust responsibility to the Oglala Sioux Tribe under the 1825 Treaty, the 1851 Fort Laramie Treaty, the 1868 Fort Laramie Treaty and federal statutory and common law.

65. This trust responsibility, *inter alia*, requires Defendants to consult with and reasonably to accommodate the views of the Oglala Sioux Tribe prior to taking any significant actions regarding transfer, leasing or management of the recreational areas and other lands that are the subject of this action.

66. On or about February 8, 2002, Defendants purported to transfer or lease to the State of South Dakota certain recreational areas and other lands that are the subject of this action, having failed and refused to consult with and reasonably to accommodate the views of the Oglala Sioux Tribe prior to taking any significant actions regarding transfer, leasing or management of the recreational areas and other lands that are the subject of this action, and are likely to transfer or lease to the State of South Dakota the balance of the recreational areas and other lands that are the subject of this action, and are likely to continue to fail and refuse to consult with and reasonably to accommodate the views of the Oglala Sioux Tribe prior to taking any significant actions regarding transfer, leasing or management of the recreational areas and other lands that are the subject of this action, unless declaratory relief and relief in the nature of mandamus is granted by this Court

67. Plaintiff has suffered injury in fact to its legally-protected interests in the recreational areas and other lands that are the subject of this action as a direct result of the aforesaid actions, failures and refusals of Defendants, and is likely to continue to

suffer such injury, and is likely to suffer further such injury as a direct result of the aforesaid likely further actions and likely failures and refusals of Defendants, unless declaratory and injunctive relief is granted by this Court.

FOURTH CLAIM FOR RELIEF

68. Plaintiff realleges the allegations contained in paragraphs 1-67, above.

69. The National Historic Preservation Act of October 15, 1966, P.L. 89-665, § 110, 80 Stat. 915, *as amended*, 16 U.S.C. § 470h-2(a)(2), requires Defendant Army Corps of Engineers to locate, inventory and nominate for inclusion in the National Register of Historic Places all Native American cultural items and other historic properties within the recreational areas and other lands that are the subject of this action that appear to qualify for inclusion in the National Register.

70. Defendant Army Corps of Engineers has failed and refused and continues to fail and refuse to locate, inventory and nominate for inclusion in the National Register Native American cultural items and other historic properties within the recreational areas and other lands that are the subject of this action that appear to qualify for inclusion in the National Register.

71. Plaintiff has suffered injury in fact to its legally-protected interests in the Native American

cultural items and other historic properties within the recreational areas and other lands that are the subject of this action as a direct result of the failure and refusal by Defendant Army Corps of Engineers to locate, inventory and nominate for inclusion in the National Register such Native American cultural items and other historic properties that appear to qualify for inclusion in the National Register, and is likely to continue to suffer such injury, unless relief in the nature of mandamus is granted by this Court.

F. PRAYER FOR RELIEF.

WHEREFORE, Plaintiff prays that this Court grant the following relief:

1. A Declaration pursuant to 28 U.S.C. § 2201 that the Act of March 2, 1889, ch. 405, 25 Stat. 888, never became effective by its terms in accordance with section 28 thereof; that the Act of March 2, 1889 did not operate to diminish or otherwise alter the boundaries of the Great Sioux Reservation as defined by article 2 of the Fort Laramie Treaty of April 29, 1868, United States-Sioux Nation, 15 Stat. 635; that subsequent to March 2, 1889 the boundaries of the Great Sioux Reservation have never be [sic] diminished or otherwise altered; and that each of the recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation are subject to the provisions of article 12 of the 1868 Fort Laramie Treaty;

2. A Declaration pursuant to 28 U.S.C. § 2201 that the transfers and leases on or about February 8, 2002 by Defendants to the State of South Dakota of recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation are without force or effect;

3. An Injunction prohibiting Defendants from transferring any recreational areas or other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation to the State of South Dakota pursuant to the Water Resources Development Act of August 17, 1999, P.L. 106-53, Title VI, §§ 601-609, 13 Stat. 269, 385, *as amended*, without the voluntary consent of each of the bands of the Sioux Nation that were signatory to the 1868 Fort Laramie Treaty, or their successors, including the Oglala Sioux Tribe, obtained in the manner and form specified in article 12 of the 1868 Fort Laramie Treaty;

4. A Declaration pursuant to 28 U.S.C. § 2201 that Defendants are required to consult with and reasonably to accommodate the views of the Oglala Sioux Tribe prior to taking any significant actions regarding transfer, leasing or management of the recreational areas and other lands that are the subject of this action;

5. Relief in the nature of mandamus requiring Defendants to consult with and reasonably to accommodate the views of the Oglala Sioux Tribe prior to taking any significant actions regarding transfer,

leasing or management of the recreational areas and other lands that are the subject of this action;

6. Relief in the nature of mandamus requiring Defendant Army Corps of Engineers to locate, inventory and nominate for inclusion in the National Register of Historic Places in accordance with the National Historic Preservation Act of October 15, 1966, P.L. 89-665, § 110, 80 Stat. 915, *as amended*, 16 U.S.C. § 470h-2(a)(2), all Native American cultural items and other historic properties within the recreation areas and other lands that are the subject of this action that appear to qualify for inclusion in the National Register;

7. Reasonable attorney fees, expert witness fees and costs of suit under the Equal Access to Justice Act, 28 U.S.C. § 2412; and

8. Such other further relief as is just, proper and equitable under the circumstances.

Respectfully submitted this 8th day of September, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND RELIEF IN THE NATURE OF MANDAMUS was served by mailing, by U.S. Mail with first class postage prepaid thereon, and where indicated by facsimile transmission, on the following persons and addressed as follows this 8th day of September, 2003.

John H. Martin, Esq.
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Natural Resources Division
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[Exhibits Omitted In Printing]

INDIAN CLAIMS COMMISSION ACT OF AUGUST 13 1946, § 2, 60 Stat. 1049, 1050, formerly codified at 25 U.S.C. § 70a (repealed)

SECTION 2.

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U.S.C. sec. 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United

States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

INDIAN CLAIMS COMMISSION ACT OF AUGUST 13 1946, § 12, 60 Stat. 1049, 1052, formerly codified at 25 U.S.C. § 70k (repealed)

SECTION 12.

The Commission shall receive claims for a period of five years after the date of the approval of this Act and no claim existing before such date but not resented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT OF NOVEMBER 16, 1990, P.L. 101-602, 104 Stat. 3048, 25 U.S.C. §§ 3001 (15) (A) and 3002

§ 3001. Definitions

For purposes of this chapter, the term –

(15) "tribal land" means –

(A) all lands within the exterior boundaries of any Indian reservation;

§ 3002. Ownership

(a) Native American human remains and objects

The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed) –

(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or

(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony –

(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;

(B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or

(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or

the United States Court of Claims as the aboriginal land of some Indian tribe –

(1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or

(2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.

(b) Unclaimed Native American human remains and objects

Native American cultural items not claimed under subsection (a) of this section shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 3006 of this title, Native American groups, representatives of museums and the scientific community.

(c) Intentional excavation and removal of Native American human remains and objects

The intentional removal from or excavation of Native American cultural items from Federal or tribal lands

for purposes of discovery, study, or removal of such items is permitted only if –

(1) such items are excavated or removed pursuant to a permit issued under section 470cc of title 16 which shall be consistent with this chapter;

(2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;

(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b) of this section; and

(4) proof of consultation or consent under paragraph (2) is shown.

(d) Inadvertent discovery of Native American remains and objects

(1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after November 16, 1990, shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable, and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native

Claims Settlement Act of 1971 [43 U.S.C. 1601 et seq.], the appropriate corporation or group. If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification.

(2) The disposition of and control over any cultural items excavated or removed under this subsection shall be determined as provided for in this section.

(3) If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary with respect to any land managed by such other Secretary or agency head.

(e) Relinquishment

Nothing in this section shall prevent the governing body of an Indian tribe or Native Hawaiian

organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object, or sacred object.

WATER RESOURCES DEVELOPMENT ACT OF 1999, Pub. L. 106-53, § 605(b)(3) and 607(a)(4), 1113, Stat. 269, 395

SEC. 605. TRANSFER OF FEDERAL LAND TO STATE OF SOUTH DAKOTA.

* * *

(b) LAND TRANSFERRED. – The land described in this subsection is land that –

* * *

(3) is located outside the external boundaries of a reservation of an Indian Tribe;

* * *

SEC. 607. ADMINISTRATION.

(a) IN GENERAL. – Nothing in this title diminishes or affects –

* * *

(4) any external boundary of an Indian reservation of an Indian Tribe;

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 08-5133

OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION,

Plaintiff-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.

Defendants-Appellees.

On Appeal From an Order of the United States District Court for the District of Columbia

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BRIEF OF APPELLANT

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LIST OF ALL PARTIES TO THE PROCEEDING

OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION,

Plaintiff-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
LES BROWNLEE, Acting Secretary of the Army;
DOMINIC IZZO, Principal Deputy Assistant
Secretary of the Army for Civil Works;
ROBERT B. FLOWERS, Chief of Engineers;
KURT F. UBBLOHDE, Omaha District Commander
and District Engineer, Department of the Army,
Corps of Engineers, Omaha District; and the
UNITED STATES OF AMERICA,

Defendants-Appellees.

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

The parties are: The Oglala Sioux Tribe of the Pine Ridge Indian Reservation; the United States Army Corps of Engineers; Les Brownlee, Acting Secretary of the Army; Dominic Izzo, Principal Deputy Assistant Secretary of the Army for Civil Works; Robert B. Flowers, Chief of Engineers; Kurt F. Ubblohde, Omaha District Commander and District Engineer, Department of the Army, Corps of Engineers, Omaha District; and the United States of America.

B. Rulings Under Review

To the best of counsel's knowledge, there are no related rulings under review.

C. Related Cases

To the best of counsel's knowledge, there are no related cases.

CORPORATE DISCLOSURE STATEMENT

The Olglala [sic] Sioux Tribe is a sovereign, unincorporated Indian Tribe.

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REQUEST FOR ORAL ARGUMENT

The Plaintiff-Appellant, Oglala Sioux Tribe, requests oral argument. This appeal involves issues of federal Indian law that are of such a unique nature and importance that oral discussion of the facts and applicable precedent would benefit the Court.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over the instant case under the federal question jurisdiction statute, 28 U.S.C. § 1331(a), the mandamus statute, 28 U.S.C. § 1361, and the statute conferring jurisdiction over certain civil actions brought by Indian tribes, 28 U.S.C. § 1362. This Court has jurisdiction over this appeal, taken from the final Order of the District Court dismissing the action entered March 17, 2008 under 28 U.S.C. § 1292. On May 12, 2008, Plaintiff-Appellant timely filed its Notice of Appeal pursuant to Fed.R.App.P. 4(a)(1)(B).

STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court erred in ruling that the Oglala Sioux Tribe lacks standing to raise the first three claims in its Second Amended Complaint because it does not have a legally protected interest in the recreational areas and other lands at issue, where the Tribe retains legally protected interests in such lands because the Act of March 2, 1889, ch. 405,

25 Stat. 888 ("1889 Act") never went into effect or was ratified, leaving the boundaries of the Great Sioux Reservation largely intact?

2. Whether the District Court erred in ruling that the Oglala Sioux Tribe did not suffer any injury to its legally protected rights to the cultural items and historic properties within the recreational areas and other lands at issue in its fourth claim for relief because the National Historic Preservation Act does not require the Corps to locate, inventory and nominate all of these items for inclusion in the National Register of Historic Places?

STATEMENT OF THE CASE

Plaintiff-Appellant Oglala Sioux Tribe filed the instant action against Defendants on December 28, 2001, and its Second Amended Complaint on September 15, 2003 (See Addendum pages 000010-000038).

On July 7, 2003, the District Court issued an Order to Show Cause directing Plaintiff "to show cause . . . why this case should not be dismissed for lack of subject matter jurisdiction.".

In an Opinion and Order dated March 15, 2008, and entered March 17, 2008, the District Court, the Honorable Gladys Kessler, U.S.D.J. presiding, dismissed the action "because (1) Plaintiff has failed to show that it has standing to bring its first three claims, and (2) mandamus is not the appropriate

relief for its fourth claim." (See Addendum pages 000039-000065). An Amended Memorandum Opinion was entered on March 18, 2008. (See Addendum pages 000001-000009).

STATEMENT OF FACTS

A. Oglala Sioux Tribe's governance.

The Oglala Sioux Tribe ("the Tribe") is a body politic comprised of approximately 41,000 citizens. The Tribe is the freely and democratically-elected government of the Oglala Sioux people, with a governing body recognized by the Secretary of the Interior. (Second Amended Complaint, ¶ 2).

The Tribe is the successor-in-interest to the Oglala Band of the Teton Division of the Sioux Nation[2] and is a protectorate nation of the Defendant United States of America. In 1936, the Oglala Band reorganized as the "Oglala Sioux Tribe of the Pine Ridge Indian Reservation" ("Oglala Sioux Tribe" or "the Tribe") under section 16 of the Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 476, and enjoys all of the rights and

---

[2] The Sioux Nation is comprised of seven divisions: (1) Medawakanton; (2) Sisseton; (3) Wahpakoota; (4) Wahpeton; (5) Yankton; (6) Yanatonai; and (7) Teton. *Sioux Nation v. United States*, 24 Ind. Cl. Comm. 147, 162 (1970). The Teton Division is comprised of seven distinct, sovereign bands: (1) Blackfeet; (2) Brule; (3) Hunkpapa; (4) Minnecounjou; (5) No Bows; (6) Oglala; and (7) Two Kettle. (Second Amended Complaint, ¶ 13.)

privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b. (Second Amended Complaint, ¶ 2.)

B. Oglala Sioux Tribe's aboriginal title territories.

Since time immemorial and up to and through the time of some of the actions that form the basis of the Tribe's Complaint, the seven Teton bands (including what is now the Oglala Sioux Tribe), jointly and severally, have exclusively used and occupied the following described territory in the Missouri River basin:

> (a) West of the Missouri River, approximately sixty million acres of land in what are now the States of North Dakota, South Dakota, Nebraska, Montana and Wyoming;
>
> (b) East of the Missouri River, approximately 14 million acres of land in what are now the States of North Dakota and South Dakota.

(Second Amended Complaint, ¶ 14.)

C. The 1825 Treaty.

On July 25, 1825, the United States and the Oglala Band entered into a treaty of friendship and protection, 7 Stat. 252, which treaty was duly ratified by the United States and proclaimed on February 8, 1826. (Second Amended Complaint, ¶ 17.) By Articles

[sic] 2 of the 1825 Treaty,[3] the United States brought the Oglala Band and its members under its protection and the Oglala Band became a protectorate nation of the United States. (*Id.*)

By Article 3 of the 1825 Treaty,[4] Congress extended the Trade and Intercourse Acts to the Oglala Band and its aboriginal territory, including permanent successor provisions of section 12 of the Act of June 30, 1834, ch. 161, 4 Stat. 730, *currently codified at* Rev. Stat. § 2216, 25 U.S.C. § 177, which provides that "[n]o purchase, grant, lease, or other conveyance of lands, or any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." (Second Amended Complaint, ¶ 18.).

---

[3] Article 2 of the 1825 Treaty provides that "[t]he United States agree to receive and the Sioune and Ogallala bands of Sioux into their friendship, and under their protection, and to extend to them, from time to time, such benefits and acts of kindness as may be convenient, and seem just and proper to the President of the United States." 7 Stat. 252.

[4] Article 3 of the 1825 Treaty provides that "[a]ll trade and intercourse with the Sioune and Ogallala bands shall be transacted at such place or places as may be designated and pointed out by the President of the United States, through his agents[.]" 7 Stat. 252.

D. The 1851 Fort Laramie Treaty.

On September 17, 1851, the United States, the seven bands of the Teton Division of the Sioux Nation, and others, entered into a treaty known as the 1851 Fort Laramie Treaty, 11 Stat. 749, which treaty was duly ratified by the United States. (Second Amended Complaint, ¶ 19.) Article 5 of the 1851 Fort Laramie Treaty defined the territory of the bands of the Teton Division ("1851 Treaty territory") as follows:

> commencing at the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Bute, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of the Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.

(*Id.*)

In *Sioux Tribe v. United States*, 15 Ind. Cl. Comm. 577 (1965), the Indian Claims Commission ruled that the 1851 Treaty was a multi-lateral treaty by which the United States recognized the aboriginal territory of both the seven Teton bands and of the other signatory tribes. The Commission further ruled that Article 5 of the 1851 Treaty recognized the Teton bands' joint and several aboriginal Indian title to (1) the entire sixty million acre area west of the Missouri

River and (2) the entire fourteen million acre area east of the Missouri River. (Second Amended Complaint, ¶¶ 20, 21.)

Unconsented encroachments on the 1851 Treaty territory by the United States and its citizens resulted in the Powder River War of 1866-1868 between the United States and the Teton bands. Peace was concluded between the United States and the Teton bands by a treaty entered into on April 29, 1868, 15 Stat. 635, known as the 1868 Fort Laramie Treaty ("1868 Treaty"). The treaty was duly ratified by the United States on February 16, 1869 and proclaimed on February 24, 1869. (Second Amended Complaint, ¶ 22.)

E. The 1868 Fort Laramie Treaty.

The 1868 Treaty provided for a mutual demobilization without terms of surrender on either side. (Second Amended Complaint, ¶ 22.) Article 2 of the 1868 Treaty established a designated territory within the 1851 Treaty territory boundaries for the seven Teton bands and other Sioux tribes, a territory commonly referred to as the "Great Sioux Reservation." (Second Amended Complaint, ¶ 23.) Article 2 of the 1868 Treaty describes this territory as follows:

> Commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of

> the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of the beginning; and in addition thereto, all existing reservations on the east bank of the said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named . . . .

(*Id.*) Article 2 of the 1868 Treaty again recognized the seven Teton bands' aboriginal Indian title to all the lands within the Great Sioux Reservation, including all lands west of the low water mark of the east bank of the Missouri River, and again vested that title under the Constitution and laws of the United States. (*Id.*).

Article 12 of the 1868 Treaty further provided that no future cessions of territory within the Great Sioux Reservation would be "of any validity or force as against the said Indians, unless executed or signed by at least three-fourths of all the adult male Indians, occupying or interested in the same. . . ." (Second Amended Complaint, ¶ 24).) Under Article 12, the United States and the Teton bands agreed to limit their sovereign powers to cede and to accept cessions of land for the protection and peace of both parties. (*Id.*)

F. The 1877 Act.

By the Act of February 28, 1877, ch. 72, 19 Stat. 254 ("1877 Act"), Congress purported to ratify and confirm an agreement between commissioners acting on behalf of the United States and the Teton and other bands of the Sioux Nation and the Northern Cheyenne and Arapaho tribes. (Second Amended Complaint, ¶ 25.) The purported agreement, which did not exist in fact or law, provided for the cession of over 7 million acres of land in the western part of the Great Sioux Reservation, including the Black Hills. (*Id.*) It was later determined that "the treaty was presented just to the Sioux chiefs and their leading men. It was signed by only 10% of the adult male Sioux population[,]" not by the three-fourths required by Article 12 of the 1868 Fort Laramie Treaty. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 381-382 (1980). In *United States v. Sioux Nation of Indians*, the Supreme Court held that the 1877 Act amounted to confiscation by the United States of the western end of the Great Sioux Reservation, that such confiscation violated both Article 12 of the 1868 Treaty and the Fifth Amendment to the Constitution, and that the United States was required to pay interest for this unconstitutional taking of land.

G. The 1889 Act and 1890 Proclamation.

By the Act of March 2, 1889, ch. 405, 25 Stat. 888 ("1889 Act"), Congress conditionally provided for the

creation of six smaller reservations within the balance of the Great Sioux Reservation, the release of title by Indian persons associated with each smaller reservation to each of the other five smaller reservations, and for the restoration to the public domain and the opening to settlement of the balance of the territory within the Great Sioux Reservation outside the boundaries of the six smaller reservations.[5] (Second Amended Complaint, ¶ 27.)

The effectiveness of the 1889 Act was expressly conditioned upon the acceptance and consent to its provisions in the manner required by Article 12 of the 1868 Fort Laramie Treaty, i.e., its execution and signature by three-fourths of the adult male members of bands and tribes signatory to the 1868 Treaty. (Second Amended Complaint, ¶ 27.) Section 28 of the 1889 Act provided as follows:

> Sec. 28. That this act shall take effect, only, upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in manner and form prescribed by the twelfth article of the treaty between the United States and said Sioux Indians, concluded April twenty-ninth, eighteen hundred and sixty-eight, which said acceptance and consent, shall be made known

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[5] The six smaller reservations are called the Pine Ridge Indian Reservation, the Rosebud Indian Reservation, the Standing Rock Indian Reservation, the Cheyenne River Indian Reservation, the Lower Brule Indian Reservation, and Crow Creek Indian Reservation. (Second Amended Complaint, ¶ 27.)

> by proclamation by the President of the United States, upon satisfactory proof presented to him, that the same has been obtained in the manner and form required, by said twelfth article of said treaty; which proof shall be presented to him within one year from the passage of this act; and upon failure of such proof and proclamation this act becomes of no effect and null and void.

A three-member commission[6] appointed by the Secretary of the Interior (the "Crook Commission") was charged with obtaining the consent of three-fourths of the adult male members of the bands and tribes signatory to the 1868 Treaty, as required by Section 28 of the 1889 Act in order for the 1889 Act to take effect. (Second Amended Complaint, ¶ 28.) The Crook Commission determined that it would seek to have the adult male members associated with each of the six agencies of the Interior Department within the Great Sioux Reservation ("Sioux agencies") sign a quit claim deed to evidence their consent under Article 12 of the 1868 Treaty in accordance with Section 28 of the 1889 Act (*Id.*) The Commission scheduled meetings during the summer of 1889 at the six Sioux agencies to obtain the requisite number of signatures on quit claim deeds. (*Id.*)

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[6] The three members of the commission were Charles Foster of Ohio, William Warner of Missouri, and General George Crook of the United States Army. (*Message From the President of the United States*, Sen. Exec. Doc. No. 51, 51st Cong., 1st Sess., p. 1 (1890).)

The Crook Commission failed to obtain the consent of three-fourths of the adult male members of the bands and tribes signatory to the 1868 Treaty. (Second Amended Complaint, ¶ 29.) Five thousand six hundred and seventy-eight (5,678) adult male members were eligible to give consent under Article 12 of the 1868 Treaty and section 28 of the 1889 Act, and three-fourths of that number equals 4,259. The Crook Commission obtained 4,463 signatures on quit claim deeds, but at least 521 of those signatures were invalid. At least 185 signatures obtained by the Commission were from non-Indians, at least 183 signatures were from Indian persons of mixed blood (who were disqualified from signing by section 7 of the Act of February 28, 1877, c. 72, 19 Stat. 254), at least 104 signatures were from Indians who were not members of the bands and tribes signatory to the 1868 Treaty, at least 43 signatures were from underage (non-adult) Indian persons, at least 3 signatures were from Indians who were females, and at least 3 signatures were duplicates. The Crook Commission therefore obtained no more than 3,942 valid signatures on quit claim deeds. (*Id.*)

Furthermore, the majority of the signatures obtained by the Crook Commission were obtained through coercion, fraud and bribery, including but not limited to the following means: (a) False imprisonment, by keeping adult male Indians at the Sioux agencies and preventing them from returning to their homes until they signed the quit claim deeds; (b) Threats and intimidation, including but not limited to

threatening adult male Indians: (i) that Congress would unilaterally take their reservation lands if they did not sign, (ii) that their subsistence rations would be cut if they did not sign, and (iii) that the U.S. military would be brought in to deal with them if they did not sign; (c) Fraud, by getting adult male Indians drunk to secure their signatures; (d) Fraud, by failing to inform adult male Indians that their signatures were being sought in order to approve the cession of approximately nine million acres of territory within the Great Sioux Reservation to the United States; and (e) Bribery, including but not limited to, offering money, personal favors and issuing beef and other rations to certain individuals to secure signatures. (Second Amended Complaint, ¶ 30.)

On or about January 30, 1890, the Crook Commission submitted a report concerning its activities to President Benjamin Harrison entitled *Report and Proceedings of the Sioux Commission*, Sen. Exec. Doc. 51, 51st Cong. 1st Sess. (1890) ("1890 Commission Report"). Among other things, the 1890 Commission Report contained the name of each of the persons from whom the Commission had obtained signatures on quit claim deeds. *See* 1890 Commission Report, pp. 242-307. The census records contained in the 1890 Commission Report show *prima facie* that the Commission failed to obtain signatures from three-fourths of the adult male members eligible to give consent under Article 12 of the 1868 Treaty and Section 28 of the 1889 Act. (Second Amended Complaint, ¶ 31.)

On February 10, 1890, President Harrison nevertheless issued a Proclamation, 26 Stat. 1554 ("1889 Proclamation"), declaring the 1889 Act "to be in full force and effect."[7]

Since 1890 and up to and including the present, the Oglala Band and its successor, the Oglala Sioux Tribe, has protested the facts set forth above continuously, publicly, and notoriously and has continuously, publicly and notoriously maintained that the boundaries of the Great Sioux Reservation were never diminished nor otherwise altered by the 1889 Act. (Second Amended Complaint, ¶ 35.)

The Tribe likewise has continuously, publicly and notoriously maintained that it retains recognized aboriginal Indian title to all lands located in the Great Sioux Reservation and has never acquiesced in any claim or assertion that said boundaries have been diminished or otherwise altered or that such title has been relinquished or extinguished. (Second Amended Complaint, ¶ 35.)

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[7] The Proclamation stated in relevant part:

> I, Benjamin Harrison, President of the United States, by virtue of the power in me vested, do hereby make known and proclaim the acceptance of said act by the different bands of the Sioux Nation of Indians, and the consent thereto by them as required by the act, and said act is hereby declared to be in full force and effect, subject to all the provisions, conditions, limitations and restrictions therein contained, and be governed accordingly.

26 Stat. 1554.

Since 1890 and up to and including the present, the United States has disregarded these protests. For example, the United States has denied the Band, the Tribe and its members, by force and threat of criminal prosecution, their right to use and occupy any lands – except lands within the Pine Ridge Indian Reservation – within the balance of the Great Sioux Reservation, including all lands within the other five of the six smaller reservations conditionally created in §§ 2 through 6 of the 1889 Act and the nine million acres of land conditionally restored to the public domain and opened to settlement in § 21 of the Act. (Second Amended Complaint, ¶ 36.).

H. The 1944 Flood Control Act.

By the Flood Control Act of December 22, 1944, P.L. 534, ch. 665, 58 Stat. 887, Congress authorized the Missouri Pick-Sloan Program ("Pick-Sloan Program" or "Program") and charged the Army Corps of Engineers ("the Corps") with constructing six dam and reservoir projects on the main stem of the Missouri River under the Program. (Second Amended Complaint, ¶ 37.) Thereafter, the Corps acquired approximately two million acres of land ("Pick-Sloan Project Lands") for the six dam and reservoir projects and constructed the projects. (*Id.*). Four of the dams and reservoirs are located in South Dakota, within the Great Sioux Reservation: Oahe Dam and Lake Oahe; Big Bend Dam and Lake Sharpe; Fort Randall Dam and Lake Francis Case; and Lewis and Clark

Dam and Lewis and Clark Lake ("South Dakota Pick-Sloan Projects"). (*Id.*)

In the case of Oahe Dam and Lake Oahe, the Corps acquired some of the land for this project by an agreement between the United States and the Cheyenne River Sioux Tribe enacted by the Act of September 4, 1954, P.L. 776, 68 Stat. 1191 ("1954 Agreement"). The balance of the land for the South Dakota Pick-Sloan Projects was acquired by the Corps through condemnation or mesne conveyances. The Oglala Sioux Tribe was not a party to the 1954 Agreement, nor was it a party to any condemnation proceeding relating to, or any mesne conveyance of, Pick-Sloan Project Lands within the Great Sioux Reservation. (Second Amended Complaint, ¶ 37.)

The Corps subsequently constructed, and operated and maintained, approximately 112 shoreline recreational areas in South Dakota around the shores of Lake Oahe, Lake Sharpe, Lake Francis Case, and Lewis and Clark Lake. Of these 112 recreational areas, approximately 105 are located within the aboriginal territory of the Oglala Band. (Second Amended Complaint, ¶ 38.)

I. The Water Resources Development Act (WRDA).

By the Water Resources Development Act of August 17, 1999, P.L. 106-53, Title VI, §§ 601-609, 113 Stat. 269, 385, as amended by the Water Resources

Development Act of December 11, 2000, P.L. 106-541, Title V, § 540, 114 Stat. 2572, 2664 ("WRDA"), Congress directed the Secretary of the Army to transfer title or grant perpetual leases to recreational areas and other lands around Lake Oahe, Lake Sharpe, Lake Francis Case, and Lewis and Clark Lake to the State of South Dakota, the Cheyenne River Sioux Tribe, and the Lower Brule Sioux Tribe on or before January 1, 2002. (Second Amended Complaint, ¶ 39.) WRDA was enacted by Congress without public hearings and over the objections of the Oglala Sioux Tribe. (*Id.*)

By § 605(a)(1)(A), (b), and (c) of the WRDA, Congress directed the Secretary of the Army to convey to the State of South Dakota by transfer or lease 91,178 acres of land around the four reservoirs, including 73 recreational areas: 30 areas by transfer and 4 by lease around Lake Oahe, 8 areas by transfer around Lake Sharpe, 21 areas by transfer and 3 areas by lease around Lake Francis Case, and 6 areas by transfer and 1 by lease around Lewis and Clark Lake. (Second Amended Complaint, ¶ 40.) Fifty-one recreational areas and other lands around Lake Oahe, Lake Sharpe and Lake Francis Case[8] are located

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[8] The 7 recreational areas and other lands around Lewis and Clark Lake and 12 recreational areas and other lands on the east bank of Lake Francis Case were one time part of the aboriginal territory of the Oglala Band, but the Oglala Band and other bands of the Teton Division of the Sioux Nation voluntarily relinquished their right of exclusive use and occupancy of the area to the Yankton Division of the Sioux

(Continued on following page)

within Oglala aboriginal territory, Eighteen of these areas and other lands are located west of the Missouri River within the Great Sioux Reservation and 33 of such areas and other lands are located outside that reservation but within the fourteen million acre area east of the Missouri River that is part of Oglala aboriginal territory.[9] (*Id.*) All of these recreational areas and other lands are the subject of this action. (*Id.*)

Section 607 of Title VI of the WRDA provides that

> [n]othing in this title diminishes or affects – (1) any water right of an Indian tribe; (2) any other right of an Indian tribe, except as specifically provided in another provision of this title; (3) any treaty right that is in effect

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Nation more than a century prior to the 1825 Treaty. They are subject to the stewardship of the Yankton Sioux Tribe, and are not the subject of the instant action. (Second Amended Complaint, ¶ 41.)

[9] By § 606(b) and (c) of the WRDA, Congress directed the Secretary of the Army to convey by transfer 6 recreational areas and other lands around Lake Oahe to the Cheyenne River Sioux Tribe, and 6 recreational areas and other lands by transfer and 3 recreational areas by lease around Lake Sharpe, and other lands around Lake Francis Case, to the Lower Brule Sioux Tribe. (Second Amended Complaint, ¶ 42) These recreational areas and other lands are part of the aboriginal territory of the Oglala Band, but are within the Cheyenne River Indian Reservation, the Lower Brule Indian Reservation or the Crow Creek Indian Reservation, and are subject to the stewardship of the Cheyenne River Sioux Tribe and the Lower Brule Sioux Tribe and are not the subject of this action. (*Id.*)

> on the date of enactment of this Act; (4) any external boundary of an Indian reservation of an Indian Tribe; (5) any authority of the State of South Dakota that relates to the protection, regulation, or management of fish, terrestrial wildlife, and cultural and archaeological resources, except as specifically provided in this title; or (6) any authority of the Secretary, the Secretary of the Interior, or the head of any other Federal agency under a law in effect on the date of enactment of this Act, including – (A) the National Historic Preservation Act (16 U.S.C. 470 et seq.); (B) the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa et seq.); . . . (G) the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.); . . . .

Pub. L. No. 106-53, § 607(a).

On or about December 4, 2001, the Tribe notified the Corps pursuant to the Native American Graves Protection and Repatriation Act of November 16, 1990, PL-101-601, 104 Stat. 3048, 25 U.S.C. § 3002(a) ("NAGPRA") that it claims ownership and control of all Native American cultural items excavated or discovered, *inter alia*, at all of the recreational areas or other lands that are the subject of this action, including, but not limited to, those Native American cultural items classified by the Corps as "Teton," "Sioux," or "Arikara." (Second Amended Complaint, ¶ 44.)

The recreational areas and other lands that are the subject of this action also contain Native American cultural items and historic properties that are included or are eligible to be included in the National Register of Historic Places ("National Register") established by the National Historic Preservation Act of October 15, 1966, P.L. 89-665, 80 Stat. 915, *as amended*, 16 U.S.C. § 470 et seq. ("NHPA"), including human remains, associated and unassociated funerary objects, grave goods, sacred places and other items of cultural patrimony, prehistoric and historic village sites, ceremonial sites, structures, objects, artifacts, records and remains, and other properties, each of which is of traditional religious, cultural and historical importance to the Tribe and its members. (Second Amended Complaint, ¶ 47.) At least four of these properties are included in the National Register, and at least five of these properties have been determined by the Corps to be eligible for inclusion in the National Register but have not yet been nominated. (*Id.*) At least 43 other of these properties have been identified by the Corps as potentially eligible for inclusion in the National Register but have never been evaluated by the Corps. or nominated for inclusion. (*Id.*)

In addition, at least five other of these properties have been identified by the South Dakota State Historic Preservation Officer ("SHPO") as potentially eligible for inclusion in the National Register but have never been evaluated by the Corps or nominated for inclusion. (Second Amended Complaint, ¶ 47.)

These five other properties have been specifically characterized by the South Dakota SHPO as being "Sioux" or "Siouan." (*Id.*) The Corps has failed to perform any field assessment of these five properties. (*Id.*)

The Corps and the other Defendants have failed to conduct field surveys to ascertain the current condition of known historic properties included or eligible for inclusion in the National Register within the recreational areas and other lands that are the subject of this action. (Second Amended Complaint, ¶ 48.) As early as the period 1979 to 1983, the Corps was notified by its contract archaeologists that cultural resources were being damaged and removed by recreational users. (*Id.*) The Corps has taken inadequate or ineffective measures to protect these properties, and, as a result, many of the religious, cultural and historical resources described above have been damaged or removed during the time the properties were managed by the Corps, without the knowledge or consent of the Oglala Sioux Tribe. (*Id.*) For example, the Walth Bay Village[10] was reported in 1986 to be subject to continuing vandalism and disturbance from recreational visitors, and the largely unexcavated village site within the Spring-Cow Creek Recreational Area was already deteriorating in 1979 from erosion and recreational use. (*Id.*, ¶¶ 47, 48.)

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[10] Walth Bay Village, located within the Walth Bay Recreation Area, is a well-known and well-documented earth-lodge village. (Second Amended Complaint, ¶ 47.)

J. Tribal claims for relief in the instant action.

On December 28, 2001, the Tribe instituted the instant action to enjoin the Corps from carrying out the transfers set forth in the WRDA. In its First Claim for Relief, the Tribe seeks a declaratory judgment that (1) the 1889 Act never became effective in accordance with the conditions fixed by Section 28 of that Act; (2) that the 1889 Act therefore did not operate to diminish or otherwise alter the boundaries of the Great Sioux Reservation as defined by Article 2 of the 1868 Fort Laramie Treaty; (3) that no treaty or act of Congress subsequent to March 2, 1889 has ever diminished or otherwise altered the boundaries of the Great Sioux Reservation; and (4) that each of the recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation are subject to the provisions of Article 12 of the 1868 Fort Laramie Treaty. (Second Amended Complaint, ¶¶ 51-58 & ¶ 1 of Prayer for Relief).

In its Second Claim for Relief, the Tribe seeks a declaratory judgment that the transfers and leases on or about February 8, 2002 by the Defendants to the State of South Dakota of recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation, are without force or effect, and an injunction prohibiting Defendants from transferring any recreational areas or other lands that are the subject of this action and within the Great Sioux Reservation to the State of

South Dakota pursuant to WRDA, without the voluntary consent of each of the bands of the Sioux Nation that were signatory to the 1868 Fort Laramie Treaty, or their successors, including the Oglala Sioux Tribe, obtained in the manner and form specified in Article 12 of the 1868 Fort Laramie Treaty. (Second Amended Complaint, ¶¶ 57-62 & ¶¶ 2 & 3 of Prayer for Relief.)

In its Third Claim for Relief, the Tribe seeks a declaratory judgment that Defendants are required to consult with and reasonably accommodate the views of the Oglala Sioux Tribe prior to taking any significant actions regarding transfer, leasing or management of the recreational areas and other lands that are the subject of this action and further seeks relief in the nature of mandamus to compel such consultation and reasonable accommodation. (Second Amended Complaint, ¶¶ 63-67 & ¶¶ 4 & 5.)

By its Fourth Claim for Relief, the Tribe seeks relief in the nature of mandamus requiring the Corps to locate, inventory and nominate for inclusion in the National Register all Native American cultural items and other historic properties within the recreation areas and other lands that are the subject of this action and that appear to qualify for inclusion in the National Register.

SUMMARY OF THE ARGUMENT

Though framed in terms of Article III standing, the principal issue presented by this appeal is

whether the lower court erred in holding that, as a matter of law, the 1889 Act became effective and diminished the boundaries of the Great Sioux Reservation. Taking the allegations of the Complaint as true, as must be done for purposes of a motion to dismiss for lack of standing, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993), the 1889 Act never went into legal operation or effect given that the express conditions fixed by Congress for its taking effect were never complied with. Specifically, the requisite consent and approval of the tribes in the manner prescribed by Article 12 of the 1868 Fort Laramie Treaty was never obtained, and no "satisfactory proof" of such consent and approval was timely presented to the President before he issued his proclamation. Absent compliance with the conditions expressly imposed by Congress, the 1889 Act became a utter nullity that could not be ratified either by subsequent congressional legislation or by other actions of the Government. Because the 1889 Act never became legally effective, the boundaries of the Great Sioux Reservation remain largely intact, the Tribe has legal interests in the recreation areas and lands located within those boundaries that the Corps is seeking to transfer under Article VI of the WRDA, and thus the Tribe has standing to challenge the transfers.

This appeal further presents the issue as to whether the District Court erred in construing Section 110(a)(2)(A) of the National Historic Preservation Act

(NHPA), 16 U.S.C. § 470h-2(a)(2)(A), which provides that the Corps "shall ensure" that historic properties under its jurisdiction and control "are identified, evaluated, and nominated to the National Register," as not imposing a mandatory, affirmative duty that is enforceable by mandamus.

STANDARD OF REVIEW

Whether a party has standing to sue is a question of law that an appellate court reviews de novo. *Akzawa v. Link New Technology International, Inc.*, 520 F.3d 1354, 1355 (Fed. Cir. 2008). Moreover, the question whether a plaintiff has Article III standing to pursue its claim is a threshold question of subject matter jurisdiction, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998), which is likewise a question of law subject to *de novo* review. *Litecubes, LLC v. Northern Lights Products, Inc.*, 523 F.3d 1353, 1360 (Fed. Cir. 2008).

In deciding a motion to dismiss on the pleadings for want of subject matter jurisdiction "the allegations of the complaint should be construed favorably to the pleader." *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987) (citations and quotations omitted), As the district court did not make any factual findings on disputed issues, this Court "engage[s] in an independent review of the legal sufficiency of the District Court's views and of its application of the law to undisputed facts in the

historical record." *Hohri*, 782 F.2d at 241 (citations and quotations omitted), In addition, this Court "construe[s] the allegations of the complaint most favorably to the appellants unless such allegations are contradicted by the undisputed historical documents on which the District Court based its judgment." *Id.* at 241.

ARGUMENT

I. The Tribe Has Standing Because The Post-1877 Boundaries Of The Great Sioux Reservation Remain Intact, The 1889 Act Never Having Gone Into Effect.

The District Court concluded that "the Tribe cannot assert a valid legal interest to the lands at issue in this case because those interests were abrogated by the 1889 Act." *OST v. USACE*, 537 F. Supp. 2d 168, 170 (D.D.C. 2008). The court below further concluded that "[t]hese lands were removed from what remained of the Great Sioux Reservation, and were thus taken out of the control and interest of the tribes, *once the 1889 Act went into effect.*" *Id.* (emphasis added). Thus, according to the lower court, "the Oglala Tribe does not have a valid legal interest in the recreational areas and other lands at issue because any interest was extinguished by the 1889 Act, *once it become effective. . . .*" *Id.* at 171 (emphasis added).

As will be shown below, however, the 1889 Act never became effective, because the conditions set by

Congress for its becoming effective were never satisfied. In determining that the 1889 Act went into effect, the District Court erroneously overlooked certain basic principles of law governing the interpretation of congressional legislation affecting the boundaries of Indian reservations.

The federal courts "do[ ] not lightly conclude that an Indian reservation has been terminated." *DeCoteau v. District County Court for Tenth Judicial District,* 420 U.S. 425, 444 (1974). "[When] Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Id.,* quoting *United States v. Celestine,* 215 U.S. 278, 285 (1909); *see also Salem v. Bartlett,* 465 U.S. 463, 470 (1984) ("Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots in the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."). Only Congress can divest a reservation of its land and diminish its boundaries, and Congress must clearly evince an intent to change boundaries before diminishment will be found. *Bartlett*, 465 US. at 470; *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation . . . , and its intent to do so must be 'clear and plain.'") (citations omitted).

In determining whether the boundaries of the Great Sioux Reservation as delineated in the 1868 Fort Laramie Treaty "were subsequently diminished

by congressional enactments" such as the 1889 Act, the federal courts "are guided by well-established legal principles." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977). First, the fundamental "underlying premise is that congressional intent will control." *Id.* Secondly, in determining congressional intent, the federal courts follow "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973), *quoting Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *accord, Kneip*, 430 U.S. at 586. The mere fact that a reservation has been opened up to settlement does not necessarily mean that the opened area has lost its reservation status. *Kneip*, 430 U.S. at 586-587; *see Matt v. Arnett*, 412 U.S. 481, 504-505 (1973). "In all cases, 'the face of the Act,' the 'surrounding circumstances,' and the 'legislative history,' are to be examined with an eye toward determining what congressional intent was." *Kneip*, 430 U.S. at 587, quoting *Arnett*, 412 U.S. at 505.

In this case, the facial language of the 1889 Act, including in particular the wording of Section 28 of that Act, clearly expresses Congress' intent to make the Act conditional upon both (1) obtaining the acceptance and consent of three-fourths of the adult male members of the tribes in the "manner and form" prescribed by Article 12 of the 1868 Fort Laramie Treaty, and (2) the timely issuance of a presidential

proclamation *after* the President was first presented with "satisfactory proof" of such acceptance and consent. In view of the allegations of the Second Amended Complaint, which must be taken as true for purposes of the Defendants' motion to dismiss, neither of these conditions was satisfied, and, thus, the District Court erred in ruling that as a matter of law the 1889 Act went into effect.

A. The 1889 Act Was Expressly Conditioned On The Happening Of A Future Event, Namely Obtaining The Acceptance And Consent Of Three-Fourths Of The Adult Male Members Of The Sioux Tribes, And, As That Event Never Happened, The Act Did Not Take Effect.

It is well established that "[a] valid statute may be passed to take effect upon the happening of some future event, certain or uncertain. . . . *The legislature, in effect, declare*[s] *the law inexpedient if the event should not happen*, but expedient if it should happen."[11] *Lothrop v. Stedman*, 15 F. Cas. 922 (Cir Ct. D. Comm. 1875) (emphasis added), quoting *Barto v. Himrod*, 8 N.Y. 483, 490 (1853); *see also Phoenix Ins. Co. v. Welch*, 29 Kan. 672, 676 (1883) ("Our laws

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[11] "Expedient" means "[a]pt and suitable to [the] end in view" . . . '[w]hatever is suitable and appropriate for the accomplishment of a specified object." Black's Law Dictionary 686 (4th Ed. 1968).

abound in cases in which a statute is made dependent upon the action of some tribunal or body, or upon some other contingency, and is therefore practically dormant until such action takes place or contingency happens."); *People ex rel. Blanding v. Burr*, 13 Cal. 343, 357 (1859) ("Laws may be absolute, dependent upon no contingency, or they may be subject to such conditions as the Legislature, in its wisdom, may impose. They may take effect only upon the happening of events which are future and uncertain; and, among others, the voluntary act of the parties upon whom they are designed to operate. They are not the less perfect and complete when passed by the Legislature, *though future and contingent events may determine whether or not they shall ever take effect.*") (emphasis added).

Section 28 of the 1889 Act expressly provides that "this act shall take effect, *only*, *upon* the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in manner and form prescribed by [Article 12 of the Fort Laramie Treaty]. . . ." (Emphasis added.) The word "only" has been defined as meaning "[*s*]*olely*; merely; for no other purpose; *at no other time*; *in no otherwise*. . . ." BLACK'S LAW DICTIONARY (4th ed. 1968) (emphasis added). The term "upon" has further been defined as meaning "immediately following on: very soon after . . . on the occasion of: at the time of. . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976). The language of Section 28 therefore makes it quite clear that the 1889 Act was conditional legislation that

would take effect solely on the occasion of the acceptance of and consent to the Act by three-fourths of the adult male members of the Sioux tribes in the "manner and form" prescribed by Article 12 of the 1868 Fort Laramie Treaty and would take effect at no other time and in no other manner.

Thus, Congress made the 1889 Act's efficacy dependent upon the happening of an event that was future and uncertain, namely the acceptance of and consent to the Act by three-fourths of the adult male members of the affected Sioux tribes in the manner and form prescribed by Article 12 of the 1868 Fort Laramie Treaty. Because, as alleged by the Tribe, that event never happened, the 1889 Act never took effect.

B. The 1889 Act Was Also Expressly Conditioned On The Timely Presentation Of "Satisfactory Proof" To The President, Which Condition Was Not Timely Met, Rendering The Act Of No Effect And Null And Void.

Section 28 of the 1889 Act further provided that the required acceptance of and consent to the 1889 Act by three-fourths of the adult male members of the Sioux tribes, upon which event the Act was to "take effect," was to "be made known by proclamation by the President of the United States." Section 28, however, also required that, before the President could issue such a proclamation, he had to have been presented with "*satisfactory proof* . . . that the same has been obtained in the manner and form required,

by said twelfth article of said treaty [, i.e., the 1868 Fort Laramie Treaty]." (Emphasis added.) Furthermore, Section 28 required that such satisfactory proof "shall be presented to him [, i.e., the President,] within one year from the passage of this act," and that if satisfactory proof were not so timely presented to the President, "this act becomes of no effect and null and void."

Thus, the taking effect of the 1889 Act by presidential proclamation was made contingent on the President ascertaining that he had been timely presented with "satisfactory proof" of the requisite acceptance of and consent to the Act by the Sioux Tribes. The Supreme Court similarly recognized, in *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), that the suspension of a congressional act could be made contingent upon the President ascertaining the existence of a fact and then issuing a proclamation:

> As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining the fact and issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law making department to

> ascertain and declare the event upon which its expressed will was to take effect.

143 U.S. at 693. Justice Lamar, in his opinion concurring in the judgment in *Field v. Clark,* likewise recognized, in discussing prior congressional legislation, that

> . . . The legislation was purely contingent. It provided for an ascertainment by the President of an event in the future, an event defined in the act and directed to be evidenced by his proclamation. It also prescribed the consequences which were to follow upon the proclamation, Such proclamation was wholly in the nature of an executive act, a prescribed mode of ascertainment, which involved no exercise by the President of what belonged to the law-making power. The supreme will of Congress would have been enforced whether the event provided for had or had not happened, either in the continuance of the restrictions, on the one hand, or on the other, in their suspension.

Id. at 699 (Lamar, J., concurring in the judgment).

The timely presentation of satisfactory proof to the President was thus a condition precedent to the President's ability to issue a proclamation. "The provisions of the act quoted are . . . conditions precedent to the issuance of a proclamation by the President under this section. It was very plainly the congressional intent that no proclamation should be issued by the legislative agent, the President, without

some investigation by a body able to ascertain the facts [or, as in this case, without the presentation to the President of satisfactory proof of the requisite acceptance and consent]. Such an investigation [or, as in this case, such a presentation] insured greater accuracy in the findings of the President. . . . But when he acts, he must act within the limits defined by the law." *William A. Foster & Co. v. United States*, 20 C.C.P.A. 15, 22, T.D. 45673 (U.S.Ct.Cust. & Pat.Appeals 1932).

The term "satisfactory proof," like "satisfactory evidence," refers to "such evidence as is sufficient to produce a belief that the thing is true . . . such evidence as, in respect to its amount or weight, is adequate or sufficient to justify the court or jury in adopting the conclusion in support of which it is adduced." *Allied Tube & Conduit Corp. v. United States,* 24 C.I.T. 1357, 1371, 127 F. Supp. 2d 207, 220 (U.S. Ct. of Int'l Trade 2000), quoting BLACK'S LAW DICTIONARY (5th ed. 1979); *accord, Walker v. Collins,* 59 F. 70, 74 (8th Cir. 1893), *rev'd on other grounds,* 167 U.S. 57 (1897); *United States v. Detroit Timber & Lumber Co.,* 124 F. 393, 402 (Cir. Ct. W.D. Ark. 1903), *rev'd on other grounds,* 131 F. 668 (8th Cir. 1904), *aff'd*, 200 U.S. 321 (1906). It is "evidence of sufficient weight and authority as to justify [the factfinder's] factual conclusions as the only reasonable outcome." *Allied Tube & Conduit* 24 C.I.T. at 1371, 127 F. Supp. 2d at 220. Thus, the Supreme Court has held that a statute requiring that a particular element be "established to the satisfaction of the Commissioner"

means "that the additional element is not lightly to be inferred but to be established by *proof which convinces in the sense of inducing belief.*" *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386, 398 (1934) (emphasis added).

Satisfactory proof "does not mean beyond a reasonable doubt, but it should not be ambiguous, equivocal, or contradictory; it should be perspicuous, and cause the mind to repose confidence in it." *State v. Brooks*, 101 Utah 584, 590, 126 P.2d 1044 (1942), citing *American Freehold Land Mfg. v. Pace*, 23 Tex. Civ. App. 222, 56 S.W. 377 (Tex. Civ. App. Austin 1900, writ ref'd). It should "cause a reasonable person under all the circumstances to believe in its sufficiency," *Brooks*, 101 Utah at 590. It requires stronger proof than by a preponderance of the evidence. *See Walker v. Collins*, 59 F. at 73.

It has also been held that "satisfactory evidence" requires "[p]roof of the circumstances and conditions, and a full and candid explanation thereof[.]" *B.K, Elliott Co. v. United States*, 44 C.C.P.A. 189, 192 (U.S.Ct.Cust. & Pat.Appeals 1957) (emphasis added), quoting *Linen Thread Co. v. United States*, 13 Ct. Cust. 301, T.D. 41220 (1925).

The allegations of the Second Amended Complaint show that the President was not presented with "satisfactory proof." The census records contained in the 1890 Commission Report show *prima facie* that the Commission failed to obtain signatures from three-fourths of the adult male members eligible to

give consent under Article 12 of the 1868 Treaty and Section 28 of the 1889 Act. (Second Amended Complaint, ¶ 31.) Furthermore, the 1890 Commission Report did not contain a full and candid explanation of the circumstances and conditions surrounding how the signatures were obtained, as it omitted any mention of the fact that most, if not all, of the signatures that were actually obtained were not voluntarily given, but rather were induced by coercion, inebriation, fraud and bribery. (Second Amended Complaint, ¶ 30.)

As the President was not presented with satisfactory proof of the requisite acceptance and consent of the Sioux Tribes to the 1889 Act within one year after the passage of the Act, the Act was rendered "of no effect and null and void." Additionally, while the 1889 Act established two separate and distinct pre-requisites, (1) obtaining the signatures of three-fourth of the adult males and (2) obtaining satisfactory proof of signatures and issuing the proclamation, the simple language of the 1889 Act makes it clear that the second pre-requisite does not and cannot stand alone. The Congressional requirements of the 1889 Act are clear. The Act does not go into effect in the absence of the three-fourths signatures, The signature verification and the Presidential proclamation, are merely the Congress' choosen method of announcing the results of the vote to the public. Thus, without the required signatures, the proclamation and all of the actions taken in

issuing it are irrelevant because the Act becomes null and void on the 366th day.

C. Because The Failure To Satisfy The Conditions Set Forth In Section 28 Of The 1889 Act Rendered The Act Utterly Void, Not Merely Voidable. It Could Not Be Subsequently Ratified By The Actions Of Either Congress Or The Government.

The District Court reasoned that, "[w]hile the Tribe argues that the 1889 Act was not properly ratified, given the Sioux Commission's failure to garner the consent of three-fourths of the adult tribal members, it is undisputed that the United States government acted upon the supposed ratification by creating six reservations for the various tribes, including the Oglala Tribe's Pine Ridge Reservation, and returning the other land to the public domain," *OST*, 537 F. Supp. 2d at 170. The lower court further stated that "regardless of whether the Crook Commission received the required authorization to cede tribal lands under Article 12 of the 1868 Fort Laramie Treaty, and thus Section 28 of the 1889 Act, the United States government took action to diminish Reservation boundaries at that time and Congress passed many acts 'to [further] change the boundaries of the original 1889 Rosebud Reservation.'" *Id.* at 171 (quoting *Kniepp*, 430 U.S. at 615). The court below therefore concluded that, even if the 1889 Act did not go into effect because "the Sioux Commission failed to

legally collect the signatures required to make the 1889 Act legally effective," *Id.* at 169, the Act's provisions were nevertheless somehow ratified and the post-1877 remnant of the Great Sioux Reservation was terminated by the actions of the Government in diminishing the Reservation and by "Congress' enactment of subsequent legislation." *Id.* 171.

The District Court thereby erred, because (1) Congress specifically declared that a failure to satisfy the conditions for making the 1889 Act effective would render that Act absolutely and utterly "null and void," and (2) subsequent acts of the Government and Congress could therefore not serve to ratify such an utterly void piece of legislation.

It has been recognized that "Legislatures use the word 'void' in statutes [in two different senses, namely] in the sense of utterly void so as to be incapable of ratification, and in the sense of voidable by those alone whose rights are infringed without express discrimination, so that resort must be had to settled rules for the interpretation of statutes in each case to determine in which sense the Legislature intended to use it," *Doherty v. Bartlett,* 81 F.2d 920, 926 (1st Cir.), *cert. denied*, 298 U.S. 676 (1936) (quoting *Westerlund v. Black Bear Mining Co.*, 203 F. 599, 611 (8th. Cir. 1930)). "One of these rules is that *an act* or contract *so declared void by statute which is* malum in se or *against public policy is utterly void and incapable of ratification*, but an act or contract so declared void, which is neither wrong in itself nor

against public policy, but which has been declared void for the protection of a certain party, or class of parties, is voidable only and is capable of ratification by the acts or silence of the beneficiary or beneficiaries," *Id.* (emphasis added). *See also Cecil B. De Mille Productions, Inc. v. Woolery,* 61 F.2d 45, 49 (9th Cir. 1932) ("The doctrines of estoppel by law and ratification have no application to a contract which is void because it violates an express mandate of law or the dictates of public policy. Such a contract has no legal existence for any purpose and neither action nor inaction of a party to it can validate it and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity."), quoting *Tatterson v. Kehrlein*, 88 Cal. App, 34, 48, 49, 263 P. 285 (1927).

In this case, Congress used the term "null and void" in the sense of utterly void and thus incapable of ratification, since without (a) the requisite acceptance of and consent to the 1889 Act by the Sioux Tribes in the "manner and form" prescribed by Article 12 of the 1868 Fort Laramie Treaty as prescribed by Section 28, and (b) timely presentation to the President of "satisfactory proof" thereof, implementation of the provisions of the Act would be against the manifest public policy to protect the Sioux Indians. For example, *in American Surety Co. v. United States*, 112 F.2d 903 (10th Cir. 1940), the surety company argued that the United States was estopped to deny the validity of the assignment of a lease on coal bearing Indian lands, Applicable

statutes and regulations made the assignment ineffectual without approval by the Secretary of the Interior. The Tenth Circuit held as follows:

> The public policy of the United States to thus afford protection to the Indians with respect to leases of coal land was clearly manifested. *To permit such prerequisite to validity to be rendered unnecessary by the application of the doctrines of estoppel, ratification, or latches would thwart that public policy.*

Id. at 906 (emphasis added).

Similarly, in *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432 (9th Cir. 1971), Secretary of the Interior Ickes, in 1934, acting pursuant to authority granted by the then recently adopted Indian Reorganization Act, ordered a temporary withdrawal of certain Indian lands from entry and disposal under the federal land and mining laws, essentially restoring these lands to tribal ownership. The lands affected included certain remaining surplus lands on the Colville Reservation. Although the Ickes withdrawal was later frustrated by the vote of a majority of Colville Tribe rejecting the Indian Reorganization Act, Congress, by Act of July 24, 1956, 70 Stat. 626, overrode this rejection by restoring the surplus lands on the Colville Reservation to tribal ownership.

In a subsequent action by the United States to quiet title to certain lands on the Colville Reservation, Consolidated Mines & Smelting Company

(Consolidated) argued that the Government was estopped from denying Consolidated's mining claims in view of certain actions of officials of the Department of the Interior. In denying this estoppel claim, the Ninth Circuit reasoned in pertinent part:

> [T]o allow an estoppel in this case would frustrate the public policy of protection of Indian lands and resources which lies behind the Ickes withdrawal, the Indian Reorganization Act, and the Act of July 24, 1956, 70 Stat. 626, restoring the Colville Reservation to tribal ownership. "For no more than private contract can estoppel be the means of successfully avoiding the requirements of legislation enacted for the protection of a public interest." *Scott Paper Co. v. Marcalus Manufacturing Co., Inc.*, 326 U.S. 249, 257 . . . (1945) (involving potential frustration of the patent laws).

455 F.2d at 446. After discussing the First Circuit's holding in *American Surety Co.*, the Ninth Circuit concluded that "[t]he manifested public policy of the United States and the effect upon that policy were the doctrine of estoppel applied are similar in this case." *Id.* at 447. *See also Getty Oil Co. v. Department of Energy*, 581 F.2d 838, 843 (Temp. Emer. Ct. App. 1978), *cert. denied*, 439 U.S. 1070 (1979) (doctrine of estoppel "cannot be invoked to avoid duties lawfully imposed by Congress to protect the public interest"); *Oliver v. Oliver*, 185 F.2d 429, 433 (D.C. Cir. 1950) ("estoppel cannot be set up in opposition to a public policy laid down by the law-making power").

In this case, the 1889 Act, including especially Section 28 thereof, manifest a public policy of the United States to protect the interests of the Sioux Indians by imposing strict conditions on the Act's taking effect and thus on the cession of lands called for in the 1889 Act. To render these conditions nugatory by applying the doctrine of ratification (or, for that matter, the doctrines of estoppel or laches) would thwart that public policy.

Consequently, upon failure of the salutary conditions for its taking effect, the 1889 Act became utterly void and incapable of ratification. The District Court therefore erred in essentially determining that the Act was ratified by subsequent acts of the Government and/or by the subsequent passage of legislation by Congress.

D. The District Court's Reliance On The Supreme Court's Decision In *Kniepp* Was Misplaced.

The District Court, in ruling that the Tribe's legal interests in the lands at issue in this litigation were abrogated by the 1889 Act, quoted as follows from the Supreme Court's decision in *Kniepp*:

> [I]n dealing with the validity of the cession of tribal lands enacted in contravention of a treaty requiring three-fourths Indian consent . . . "it was never doubted that the power to abrogate [the treaty] existed in Congress . . . [such that] the judiciary cannot question or inquire into the motives which promoted the

> enactment of [the cession] legislation." Although [the administrative commission] failed to garner the signature of three-quarters of the Indians in consent of the proposed changes, Congress understandably relied on this holding as authorizing it to diminish unilaterally the Reservation boundaries.

OST v. USACE, 537 F. Supp. 2d at 171, quoting *Kniepp*, 430 U.S. at 594 (quoting in turn *Lone Wolf v. Hitchcock*, 187 U.S. 553, 556, 558 (1903)).

Kniepp, however, dealt with three pieces of legislation that were passed by Congress in 1904, 1907 and 1910. Prior to 1903, the question of whether Congress could unilaterally abrogate a treaty provision calling for the consent of tribal members to the diminishment of reservation boundaries was unsettled. In 1903, the Supreme Court in *Lone Wolf v. Hitchcock* held that Congress could so abrogate a treaty provision requiring three-fourths Indian consent, saying:

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was

> never doubted that the power to abrogate existed in Congress.

187 U.S. at 556.

Thus, in adopting the 1904 and subsequent legislation at issue in *Kniepp*, "Congress understood that it was not bound by the three-fourths-consent requirement of the 1868 Treaty with the Sioux Nation." 430 U.S. at 594. Indeed, the Supreme Court in *Kniepp* found that "Congress was explicitly aware that it was acting pursuant to the holding in *Lone Wolf v. Hitchcock*[.]" *Id.* at 598 n. 19 (citations to the legislative record omitted).

The 1904 Act, moreover, contained "language of immediate cession," *Id.* at 596-597, providing that "[t]he said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Reservation now remaining unallotted, situated within the boundaries of Gregory County[.]" *Id.* at 597, citing 33 Stat. 256.

The Supreme Court in *Kniepp* therefore concluded that Congress, in enacting the 1904 legislation

> was under no misapprehension that the required portion of the [Rosebud Sioux] Tribe had in fact approved the [1903] treaty [on which the 1904 legislation was premised]. It knew that while a majority of the Tribe had approved it, the required extraordinary

> [three-fourths] majority had not; *but it had determined nonetheless to go ahead and accomplish the same result unilaterally* as the [prior 1901] Agreement [for which the requisite three-fourths Indian consent had been obtained] would have accomplished bilaterally.

Id. at 598 (emphasis added and footnote omitted). The Court then went on to find "a continuity of intent [to disestablish the reservation] through the 1907 and 1910 Acts." *Id.* at 606.

By contrast to the 1904 Act, which was the "crucial" piece of congressional legislation at issue in *Kniepp*, *see id.* at 606 n. 30, the 1889 Act was passed well before the Supreme Court's 1903 decision in *Lone Wolf v. Hitchcock*. There is no historical evidence indicating that, at the time of the passage of the 1889 Act, Congress understood that it had the power to act unilaterally to abrogate the provisions of an Indian treaty calling for an extraordinary majority of tribal members to consent to and/or approve of any future cession of Indian lands.

More importantly, it is clear that Congress did not intend to act unilaterally in enacting the 1889 Act. Far from using language of immediate cession, Congress expressly made the effectiveness of the 1889 Act conditional upon compliance with the three-fourths Indian consent requirement of Article 12 of the 1868 Fort Laramie Treaty and upon the timely presentation of "satisfactory proof" of such compliance to the President. No such conditional language

is to be found anywhere in the 1904, 1907 or 1910 congressional acts at issue in *Kniepp*.

"[T]he intention to abrogate or modify a treaty is not to be lightly imputed to Congress." *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968), quoting *Pigeon River Improvement, Slide & Boom Co. v. Cox Co.*, 291 U.S. 138, 160 (1934). Generally, Congress will not be presumed to have intended to abrogate treaty rights unless it has made its intention "clear and plain." *See United States v. Dion*, 476 U.S. 734, 738 (1986), citing Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW, p. 223 (1982 Ed.). "Absent explicit statutory language, [the Supreme Court has] been extremely reluctant to find congressional abrogation of treaty rights." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979). Because "Indian treaty rights are too fundamental to be easily cast aside,", the federal courts do not construe statutes as abrogating treaty rights in "a backhanded way." *United States v. Dion*, 476 U.S. at 739

Certainly, an intent to abrogate treaty rights cannot be imputed to Congress where it expressly conditioned the efficacy of the 1889 Act upon compliance with Section 12 of the 1868 Fort Laramie Treaty. Thus, even assuming that in 1889 Congress understood it had the power to act unilaterally to diminish the boundaries of the Great Sioux Reservation, it deliberately chose not [sic] do so in enacting the 1889 Act. Thus, the District Court's reliance upon *Kniepp* was entirely misplaced.

E. The WRDA Must Be Read In Pari Materia With The Mni Wiconi Project Act of 1988.

The District Court stated below that "Congress authorized the transfer of land at issue by passing the WRDA, which does not even mention the 1868 Fort Laramie Treaty or any rights the tribe might assert under it." *OST*, 537 F. Supp. 2d at 170. The lower court then noted:

> In particular, § 605 of the WRDA specifically addresses the interests of Plaintiff in the Corps' transfer of land to the State of South Dakota, stating that "[a]ll permits, rights-of-way, and easements granted by the Secretary to the Oglala Sioux Tribe for land on the west side of Missouri River between Oahe Dam and Highway 14, and all permits, rights-of-way, and easements on the other land administered by the Secretary and used by the Oglala Sioux Rural Water Supply system, are granted to the Oglala Sioux Tribe in perpetuity to be held in trust under section (3)(e) of the Mni Wiconi Project Act of 1988 (102 Stat. 2568." Pub. L. No. 106-53, § 605(a)(1)(B). If the Secretary previously had the power to grant permits, rights-of-way, and easements to the Tribe for the land at issue, that is further acknowledgment that the tribe did not possess the land prior to passage of the WRDA. See Black's Law Dictionary 527 (7th Ed. 1999) (defining easement, in part, as "the right to use" land "owned by another person").

Id. at 170 n. 4.

The District Court failed to realize that the quoted portion of § 605 of the WRDA constitutes an amendment to the Mni Wiconi Project Act of 1988 ("Mni Wiconi Act"), Public Law 101-516, 102 Stat. 2566 (Oct. 24, 1988), Section 3(a) of the Mni Wiconi Act authorized the construction of water system pipelines of the Oglala Sioux Rural Water Supply System across the Corps' lands. Public Law 101-516, 102 Stat. 2567 (Oct. 24, 1988). In construing § 605 of the WRDA, the District Court completely overlooked Section 11 of the Mni Wiconi Act, which provides as follows:

> Nothing in sections 1 through 12 [of the Mni Wiconi Act] shall be construed to –
>
> . . . .
>
> (5) Affect any water rights or claims thereto of the Oglala Sioux tribe, located within or without the external boundaries of the Pine Ridge Indian Reservation, based on treaty, Executive order, agreement, Act of Congress, aboriginal title, the Winter's doctrine (*Winters v. United States*, 207 U.S. 564 (1908)), or otherwise. Nothing contained in this section or in section 1 through 12, however, is intended to validate or invalidate any assertion of the existence, nonexistence or extinguishment of any water rights, or claims thereto, held by the Oglala Sioux Tribe, or any other Indian tribe or individual Indian under Federal or State law.

Public Law 100-516, § 11(5), 102 Stat. 2571 (Oct. 24, 1988).

Under the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read "as if they were one law." *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 315-316 (2006), quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). Section 605 of the WRDA, which is an amendment to the Mni Wiconi Act and deals with the same subject matter, should therefore be read in pari materia with the Mni Wiconi Act itself, including Section 11 of that Act. So read, it can readily be seen that Congress intended to preserve and not to adversely affect the claims of the Oglala Sioux Tribe to interests in lands outside of the Pine Ridge Indian Reservation based on either treaty (including those based on the 1868 Fort Laramie Treaty) or aboriginal title. By construing the language of § 605 of the WRDA in isolation, and as cutting against the Tribe's assertion of legal rights to the lands at issue in this case, the District Court improperly thwarted the intent of Congress as clearly expressed in Section 11 of the Mni Wiconi Act.

F. <u>Conclusion.</u>

In sum, the District Court erred in failing to determine that the 1889 Act never went into effect, that Congress never passed subsequent legislation that in clear and plain language terminated the Great Sioux Reservation, that the recreational areas

and other lands at issue in this case have never been ceded in accordance with Article 12 of the 1868 Fort Laramie Treaty, and that the Tribe therefore has a legal interest in the recreational areas and other lands at issue in this case sufficient to accord it Article III standing to sue.

II. Defendants Owe The Tribe A Trust Responsibility To Consult Over The Transfer or Leasing Of The Corps Lands At Issue In This Case.

It has long been recognized that the Tribe, as well as the other tribes and bands who were parties to the Fort Laramie Treaty of 1851, have aboriginal interests in the lands set aside by that treaty for the occupancy and use of the various tribes and bands, a portion of which lands eventually became the Great Sioux Reservation. *See Cheyenne-Arapaho Tribes of Indians of Oklahoma, et al. v. United States*, 10 Ind. Cl. Comm. 64, 65-66 (1961) (finding that by the Fort Laramie Treaty of 1851, "the United States of America, immediately before and after the execution and ratification of said treaty, . . . accepted, acknowledged, ratified and confirmed petitioners' [and hence the other signatory tribes'] aboriginal Indian title and right of occupancy and use of the territory" set aside for such tribes); *see also Sioux Tribe v. United States*, 15 Ind. Cl. Com. 577 (1965) (ruling that Article 5 of the 1851 Fort Laramie Treaty recognized the Teton bands' joint and several aboriginal title to lands described in ¶ 14 of the Second

Amended Complaint). The District Court in fact recognized "possible injuries that could result from the Government's alleged failure to exercise its trust responsibility to the aboriginal interests of the Oglala and other tribes, in the lands held in the Great Sioux Reservation." *OST v. USACE*, 537 F. Supp. 2d at 169, citing *Haida Nation v. British Columbia (Minister of Forests)* ["*Haida Nation*"], 2002 BCCA 147 (finding Canadian government officials had a responsibility to consult with and accommodate a tribe before granting a tree farm license, a duty that arose from the government's fiduciary duty and the tribe's aboriginal interests). The District Court further acknowledged that "the Tribe relies upon the *Haida Nation* case to support the assertion that the Defendants owe the Tribe a trust responsibility based upon [the Tribe's] aboriginal interest in the lands at issue[.]" *OST v. USACE*, 537 F. Supp. 2d at 171.

The District Court nevertheless concluded that "the facts of this case are not similar to *Haida Nation*," saying:

> Specifically, the *Haida Nation* court rested its findings, in part, on the fact that the tribe had never "surrendered their Aboriginal rights by treaty, and their Aboriginal rights ha[d] not been extinguished by federal legislation." 2002 BCCA 147 at ¶ 22 (internal quotations and citations omitted). . . .
>
> In this case, the Court has already determined that the Oglala Tribe's rights to the land at issue *had been extinguished by the*

> *1889 Act, once it became effective, and other acts. See* discussion *supra*. . . . Thus, the Oglala Tribe cannot assert a valid aboriginal interest in the recreational and other lands at issue in this case[.]

Id. at 172 (emphasis added).

Again, for the reasons set forth under Heading I. of the Argument, the District Court erred in determining that the 1889 Act "became effective," since the express conditions imposed by Congress for the Act to take effect never were met. Moreover, as more fully argued under Heading I., the "other acts" referred to by the District Court (1) could not serve to ratify the 1889 Act, which was rendered absolutely void and incapable of ratification by the failure to meet the conditions set by Congress, and (2) did not, in clear and plain language, either terminate the Great Sioux Reservation or diminish its borders. Consequently, the Tribe still retains and may assert a valid ab original interest in the recreational and other lands at issue in this case.

The District Court further pointed out in its opinion below that the Canadian court in *Haida Nation* determined that "the fiduciary duty of the [[Canadian] government] to the [Canadian] aboriginal peoples [was grounded in] a general guiding principle for s. 35(1) of the Constitution Act, 1982," which states that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and confirmed." *See OST v. USACE*, 537 F. Supp. 2d at 171, citing *Haida Nation*, 2002 BCCA

147 at ¶¶ 36-37. The court below then reasoned, in further support of its conclusion that the Tribe cannot assert a "valid aboriginal interest" in the lands at issue in this case, that "the United States Constitution does not contain a similar acknowledgment of aboriginal tribal rights." *Id.* at 172.

While the federal Constitution does not contain an acknowledgment or guarantee of aboriginal tribal rights, those rights are recognized and guaranteed by the various treaties entered into between the United States and the various Native American tribes. *See, e.g., Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States*, 10 Ind. Cl. Comm. 64. These treaties are the supreme law of the land under Article VI, Clause 2 of the U.S. Constitution. Thus, a fiduciary duty to consult on the transfer or leasing of Corps lands under WADA owed by the federal Government to the Tribe, similar to that recognized by the Canadian court in *Haida Nation*, can and should be recognized from the the 1851 Fort Laramie Treaty and the 1868 Fort Laramie Treaty, as well as from federal statutory and common law. *See also* Executive Order 13175 promulgated by President Clinton on November 6, 2000, which requires federal agencies to consult and collaborate with tribal officials with respect to, inter alia, "actions that have substantial direct effects on one or more Indian tribes."

In short, as the Government owes a fiduciary duty or trust responsibility to the Tribe regarding the

lands in question, the Tribe has a valid legal interest in those lands.

III. Given The Tribes Valid Legal Interests In The Recreational Areas And Other Lands That Are The Subject Of This Litigation, The Tribe Has Standing To Sue To Remedy An Injury In Fact To Those Interests Caused By The Corps' Proposed Transfer Of Lands Under Article VI Of The WRDA.

In order to establish standing under Article III of the Constitution, a plaintiff such as the Tribe must demonstrate (1) a concrete and particularized injury that is actual or imminent, (2) caused by, or fairly traceable to, an act that the litigant challenges in the current litigation, and (3) redressable by the Court. *See OST*, 537 F. Supp. 2d at 169, citing *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 509 F.3d 562, 567 (D.C. Cir. 2007).

In this case, the Tribe has demonstrated actual and/or imminent, concrete and particularized injuries to valid legal interests that it holds in the lands in question. Specifically, the transfers of land called for by Title VI of the WRDA have and/or will cause injuries in fact to (1) the Tribe's aboriginal and legal interests in the Great Sioux Reservation, and (2) the Tribe's rights as the beneficiary of the fiduciary duty and trust responsibility owed to it by the federal Government. The conclusion of the District Court to the contrary, *see OST v. USACE*, 537 F. Supp. 2d at 172, is premised on the District Court's erroneous

conclusion that the Tribe's legal interests were "extinguished by the 1889 Act, once it became effective, and other acts," *id.*, a conclusion thoroughly refuted above under Heading I of the Argument.

The District Court further committed error in concluding that, "given that any injury to the Tribe occurred when the 1889 Act became effective and subsequent acts of Congress were enacted, and not by the transfer of lend designated in Title VI of the WRDA, the second and third standing requirements cannot be met – any injury to the Tribe's interests is neither a result of the Corps' present WRDA actions nor redressable by ordering the Corps to stop the transfers." *Id.* at 172 n. 5. The lower court thereby entirely misapprehended the nature of the Tribe's claims. The Tribe is not seeking redress for an injury or injuries occurring as a result of the 1889 Act taking effect. Rather, the Tribe asserts that the 1889 Act was rendered void and *never took effect* for failure to fulfill conditions fixed by Congress, that no subsequent act of Congress could or did ratify such an utterly void enactment, and, hence, that the Tribe did not suffer any injury to its legal interests in the subject lands until the Corps sought to make the disputed transfers those lands pursuant to Article VI of the WRDA. Hence, the second and third requirements for standing have been met, in that the injuries to the Tribe's interests have been, or will be, caused by the actions of the Corps in making the disputed transfers pursuant to Article VI of the WRDA and those

injuries are fully redressable by enjoining the Corps from making the transfers.

In sum, as all three of the requirements for Article III standing have been met, the District Court erred in determining that the Tribe lacked standing to bring its first three claims.

IV. Section 110 of NHPA Creates Mandatory Obligations Regarding Historic Preservation.

It has been recognized that Section 110 of "[t]he NHPA requires agencies to 'assume responsibility for the preservation of historic properties' they control." *Wilderness Watch v. U.S. Dept of the Interior*, 375 F.3d 1085, 1091 (11th Cir. 2004) (citing 16 U.S.C. § 470h-2(a)(1)); *accord, Save Sandy Hook Corp. v. United States Dep't of Interior*, 2007 U.S. Dist. LEXIS 67700, *4 (D.N.J. Sept. 13, 2007) ("[T]he NHPA requires the heads of each federal agency to assume responsibility for the preservation of all historic properties owned or controlled by that agency," citing 16 U.S.C. § 470h-2(a)(1)). Thus, Section 110(a) of NHPA "affirmatively requires" that a federal agency "manage and maintain property it has jurisdiction over[.]" *Fein v. Peltier*, 949 F. Supp. 374, 378 (D.V.I. 1996). More specifically, Section 110 of the NHPA creates an affirmative mandatory obligation by requiring the establishment of a preservation program that "*shall* ensure that historic properties under the jurisdiction or control of the agency, *are* identified, evaluated, and nominated to

the National Register." 16 U.S.C. § 470h-2(a)(2)(A) (emphasis added); *see also Wyoming Sawmills, Inc. v. United States Forest Service*, 179 F. Supp. 2d 1279, 1287 (D. Wyo. 2001) (recognizing that Forest Service's obligations under NHPA include "identification, evaluation, and management of historic properties in a way that considers preservation of their historic, archeological, architectural, and cultural values"), *aff'd*, 383 F.3d 1241 (10th Cir. 2004), *cert. denied*, 546 U.S. 811 (2005).

The District Court concluded, however, that 16 U.S.C. § 470h-2(a)(2)(A) does not create an affirmative mandatory obligation that can be enforced by mandamus, relying on *National Trust for Historic Preservation v. Blanck*, 938 F. Supp. 908 (D.D.C. 1996), *aff'd*, 203 F.3d 53 (D.C. Cir. 1999). *Blanck* is clearly distinguishable, however, in that the provision of the NHPA primarily at issue in *Blanck* was 16 U.S.C. § 470h-2(a)(2)(B), which requires that an agency's preservation program "shall ensure" that "properties under the jurisdiction or control of the agency as are listed in or may be eligible for the National Register *are managed and maintained in a way that considers the preservation of their historic, archaeological, architectural, and cultural values in compliance with section 106* [16 U.S.C. § 470f] and gives special consideration to the preservation of such values in the case of properties designated as having National significance." (Emphasis added.) Given the use of the word "considers" and the express reference to "compliance with section 106," the court in *Blanck* essentially concluded that the Army was not under

any mandatory, affirmative obligation to expend funds to maintain and preserve historic structures in an historic district that had already been identified and/or listed, because Section 110(a)(2)(B) "did not require Walter Reed to undertake any preservation beyond what was necessary to comply to the fullest extent possible with, and in the spirit of, the Section 106 consultation process and with its own Historic Preservation Plan." *Blanck*, 938 F. Supp. at 925.

Unlike Section 110(a)(2)(B), however, Section 110(a)(2)(A) does not use the word "considers" and makes no reference to Section 106. Rather, Section 110(a)(2)(A) unambiguously mandates ("shall ensure") that historic properties under an agency's jurisdiction or control "are identified, evaluated, and nominated to the National Register." 16 U.S.C. § 470h-2(a)(2)(A); *see Hewitt v. Helms*, 459 U.S. 460, 471 (1983) ("shall" is "language of an unmistakably mandatory character"), *overruled in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *Her Majesty the Queen v. USPA*, 912 F.2d 1525, 1533 (D.C. Cir. 1990) ("shall" signals mandatory action); *Moon v. U.S. Dep't of Labor*, 727 F.2d 1315, 1319 (D.C. Cir. 1984) ("shall" is the language of command); *Association of American Railroads v. Costle*, 562 F.2d 1310, 1312 (D.C. Cir. 1977) (same). "'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983), quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

In short, the District Court erred in failing to interpret 16 U.S.C. § 470h-2(a)(2)(A) of the NHPA as imposing an affirmative, mandatory obligation that can be enforced by mandamus.

CONCLUSION

In view of the arguments made and authorities cited above, Appellant Oglala Sioux Tribe respectfully requests that the Order of the District Court dismissing the action, entered March 17, 2008, be reversed and that the case be remanded to the District Court for a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mario Gonzalez, do hereby certify that two true and correct copies of the foregoing Brief of Appellants has been served, by depositing the copies, postage prepaid, in the United States mail on this 15th day of September, 2008, on each of the following counsel for Defendants:

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Opening Brief is proportionately spaced, has a typeface of 14 points or more and contains 13,370 words (includi g footnotes).

Dated: September 15, 2008

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